No. 84-571-AFX
Status: GRANTED

Docketed:
October 9, 1984

Title: Harry N. Walters, Administrator of Veterans' Affairs, et al., Appellants
v.
National Association of Radiation Survivors, et al.

Court: United States District Court for the Northern District of California

Counsel for appellant: Solicitor General

Counsel for appellee: Erspamer,Gordon P., Gnaizda,Robert L.

Entry	Date	Note	Proceedings and Orders
1	Aug 9 1984		Application for extension of time to docket appeal and order granting same until October 1, 1984 (Rehnquist, August 10, 1984).
2	Sep 6 1984		Application for further extension of time to docket appeal and order granting same until October 8, 1984 (Rehnquist, September 11, 1984).
3	Oct 9 1984	G	Statement as to jurisdiction filed.
4	Oct 29 1984		Record filed.
5	Oct 29 1984		Certified original record, 5 boxes, received.
6	Nov 14 1984		Motion of appellees Natl. Assn. of Radiation Survivors, et al. to affirm filed.
7	Nov 15 1984		Motion of appellee American G.I. Forum to affirm filed.
9	Nov 20 1984		REDISTRIBUTED. December 7, 1984
10	Dec 10 1984		PROBABLE JURISDICTION NOTED.
			**********
12	Jan 23 1985		Order extending time to file brief of appellant on the merits until January 31, 1985.
13	Jan 23 1985		Extension granted until February 15, 1985 to file the Joint Appendix.
15	Jan 23 1985		Order extending time to file brief of appellee on the merits until March 8, 1985.
16	Jan 31 1985		Brief amicus curiae of Disabled American Veterans filed.
17	Jan 31 1985		Brief of appellants Walters, Adminr., VA, et al. filed.
18	Feb 5 1985		SET FOR ARGUMENT. Wednesday, March 27, 1985. (1st case).
19	Feb 15 1985		Joint appendix filed.
20	Feb 13 1985		Brief amicus curiae of Andrew Groza filed.
21	Mar 5 1985		CIRCULATED.
22	Mar 6 1985	X	Brief amicus curiae of American Veterans Committee, Inc. filed.
23	Mar 8 1985	X	Brief amicus curiae of National Assn. of Atomic Veterans filed.
24	Mar 8 1985	X	Brief amicus curiae of Lawyers' Club of San Francisco filed.
25	Mar 8 1985	X	Brief amicus curiae of Federal Bar Association filed.
26	Mar 8 1985	X	Brief of appellee Natl. Assn. of Radiation filed.
27	Mar 8 1985	X	Brief of appellee American G.I. Forum filed.
28	Mar 8 1985	X	Brief amicus curiae of American Civil Liberties Union Foundation filed.
29	Mar 8 1985	X	Brief amicus curiae of Vietnam Veterans of America filed.
30	Mar 20 1985	X	Reply brief of appellants Walters, Adminr., VA, et al. filed.
31	Mar 27 1985		ARGUED.

84-571

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether 38 U.S.C. 3404, which prohibits the payment of a fee of more than $10 by a veteran to an agent or attorney in connection with an administrative claim for veterans' benefits, violates the First and Fifth Amendments.

PARTIES TO THE PROCEEDING

In addition to appellant Walters, the defendants named in the district court were the United States, the Veterans' Administration, and Paul D. Ising, the director of the VA Regional Office in San Francisco.

In addition to appellee National Association of Radiation Survivors, plaintiffs in the district court were Swords to Plowshares Veterans Rights Organization, Don E. Cordray, Albert R. Maxwell, Reason F. Warehime, and Doris J. Wilson. The American G.I. Forum also intervened as a plaintiff.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
The question is substantial	12
Conclusion	25
Appendix A	1a
Appendix B	53a
Appendix C	60a
Appendix D	61a

TABLE OF AUTHORITIES

Cases:

Arnett v. *Kennedy*, 416 U.S. 134	18, 22
Baxter v. *Palmigiano*, 425 U.S. 308	20
Bell v. *Wolfish*, 441 U.S. 520	23
Branzburg v. *Hayes*, 408 U.S. 665	19
Brown v. *Chote*, 411 U.S. 452	23
Calhoun v. *Massie*, 253 U.S. 170	21, 22
Califano v. *Webster*, 430 U.S. 313	19
Clark v. *Paul Gray, Inc.*, 306 U.S. 583	19
Columbia Broadcasting System, Inc. v. *Democratic National Comm.*, 412 U.S. 94	18
Delaware & H. Ry. v. *United Transportation Union*, 450 F.2d 603, cert. denied, 403 U.S. 911	22
Deckert v. *Independence Shares Corp.*, 311 U.S. 282	22

Cases—Continued: Page

Demarest v. *United States*, 718 F.2d 964, cert. denied, No. 83-1176 (Apr. 23, 1984) 9, 11, 13, 14, 15, 24
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 19
Energy Action Educational Foundation v. *Andrus*, 654 F.2d 735, rev'd *sub nom. Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 22
Firemen v. *Chicago, R.I. & P.R.R.*, 393 U.S. 129 19
FTC v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 22
Fullilove v. *Klutznick*, 448 U.S. 448 18
Gagnon v. *Scarpelli*, 411 U.S. 778 ..... 20, 22
Gendron v. *Levi*, 423 U.S. 802, aff'g *Gendron* v. *Saxbe*, 389 F. Supp. 1303 .... 9, 11, 13, 14, 15, 24
Goss v. *Lopez*, 419 U.S. 565 20
Harris v. *McRae*, 448 U.S. 297 23
Heart of Atlanta Motel v. *United States*, 379 U.S. 241 23
Hicks v. *Miranda*, 422 U.S. 332 13
Hines v. *Lowrey*, 305 U.S. 85 3
Hodel v. *Indiana*, 452 U.S. 314 23
Houchins v. *KQED*, 429 U.S. 1341 22
Hurtado v. *United States*, 410 U.S. 578 ... 14
James v. *Strange*, 407 U.S. 128 23
Johnson v. *Robison*, 475 U.S. 361 7
Katzenbach v. *McClung*, 379 U.S. 294 19
Kleppe v. *New Mexico*, 426 U.S. 529 19

Cases—Continued: Page

Lassiter v. *Department of Social Services*, [illegible] U.S. 18 20
Lynch v. *United States*, 292 U.S. 571 22
Marsh v. *Chambers*, No. 82-23 (July 5, 1983) .. 14
Mathews v. *Eldridge*, 424 U.S. 319 .....18, 20, 21
McLucas v. *DeChamplain*, 421 U.S. 21 2
Minnesota Bd. for Community Colleges v. *Knight*, No. 82-898 (Feb. 21, 1984) 24
Parham v. *J.R.*, 442 U.S. 584 ..... 20, 22
Railway Labor Executives' Ass'n v. *Gibbons*, 448 U.S. 1301 2
448 U.S. 909 2
Richardson v. *Perales*, 402 U.S. 389 20
Romero v. *International Terminal Operating Co.*, 358 U.S. 354 14
Rostker v. *Goldberg*, 453 U.S. 57 ..... 18, 19
Ruckelshaus v. *Monsanto Co.*, No. 83-196 (June 26, 1984) 19
Schweiker v. *McClure*, 456 U.S. 188 20
Southern Ry. v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 13
Staub v. *Johnson*, 519 F.2d 298 ..... 17, 21
Staub v. *Roudebush*, 424 F. Supp. 1346, vacated and remanded, 574 F.2d 637 25
Texaco, Inc. v. *Short*, 454 U.S. 516 19
Tully v. *Griffin, Inc.*, 429 U.S. 68 13
United States v. *Fairchilds*, 25 F. Cas. 1035 .. 13, 21
United States v. *Gouveia*, No. 83-128 (May 29, 1984) 21
United States v. *Hall*, 98 U.S. 343 ..... 13, 21

Cases—Continued: Page
United States v. *Lorenzetti*, No. 83-838 (May 29, 1984) 23
United States v. *Marks*, 26 F. Cas. 1162 .. 13, 21
United States v. *National Dairy Products Corp.*, 372 U.S. 29 14
United States Railroad Retirement Board v. *Fritz*, 449 U.S. 166 19
United Transportation Union v. *Michigan Bar*, 401 U.S. 576 24
University of Texas v. *Camenisch*, 451 U.S. 390 23
Vance v. *Bradley*, 440 U.S. 93 19
Vitek v. *Jones*, 445 U.S. 480 20
Whalen v. *Roe*, 429 U.S. 589 22
Withrow v. *Larkin*, 421 U.S. 35 22
Wolff v. *McDonnell*, 418 U.S. 539 ..... 20, 21-22

Constitution, statutes and regulations:
U.S. Const.:
Amend. I 3, 9, 11, 12, 24, 25
Amend. V (Due Process Clause) 3, 9, 11, 13, 24, 25
38 U.S.C. 211(a) 3, 7
38 U.S.C. 301 *et seq* 2
38 U.S.C. 784(a) 3
38 U.S.C. 784(g) 3
38 U.S.C. 3401 7
38 U.S.C. 3402(a)(1) 7, 8
38 U.S.C. 3402(a)(2) 7, 8
38 U.S.C. 3402(b)(1) 8
38 U.S.C. 3404 ..... 3, 9
38 U.S.C. 3404(a) 7
38 U.S.C. 3404(b) 7

Constitution, statutes and regulations—Continued: Page
38 U.S.C. 3404(c) ..... *passim*
38 U.S.C. 3405 ..... 2, 3, 9, 12
38 U.S.C. 4001 6
38 U.S.C. 4004 6
38 U.S.C. 4004(a) 6
38 U.S.C. 4005(a) 5
38 U.S.C. 4005(d)(1) 5, 6
38 C.F.R. Pt. 3:
Section 3.102 4
Section 3.103(a) 4
Section 3.103(b) 4
Section 3.103(c) 5
Section 3.103(d) 7
Section 3.103(e) 5, 6
Section 3.104 7
Section 3.105 7
Section 3.109(a) 4
Section 3.150(a) 3
Section 3.150(b) 3
Section 3.151 3
Section 3.152 3
Section 3.155(a) 4
Section 3.156 7
38 C.F.R. Pt. 14:
Section 14.626 7
Section 14.626-14.637 7
Section 14.628(d)(4), (5) 8
Section 14.628(e)(4), (5) 8
Section 14.634(b) 3
38 C.F.R. Pt. 19:
Section 19.1 6
Section 19.1(a) 6
Section 19.2 6

Constitution, statutes and regulations—Continued: Page

Section 19.104 7
Section 19.112(a) 6
Section 19.114 5
Section 19.117 5
Section 19.118 5
Section 19.119(a) 5
Section 19.119(b) 6
Section 19.120(a) 6
Section 19.120(b) 6
Section 19.121 6
Section 19.123 6
Section 19.150 7
Section 19.150-19.156 7
Section 19.157(a) 6
Section 19.157(b) 7
Section 19.157(c) 7
Section 19.160 6
Section 19.164 7
Section 19.180 7
Section 19.182 7
Section 19.185-19.190 7
Section 19.194 7

Miscellaneous:

129 Cong. Rec. S1897 (daily ed. Mar. 1, 1983) 17

Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983) 3

Miscellaneous—Continued: Page

Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Pts. 1 &2 (1973) 8

7 *Moore's Federal Practice* (1984) 22, 23

1983 VA Ann. Rep. 21

S. Rep. 96-178, 96th Cong., 1st Sess. (1979) 17

S. Rep. 97-466, 97th Cong., 2d Sess. (1982) 3, 8, 17

S. Rep. 98-130, 98th Cong., 1st Sess. (1983) 17

Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing on S. 636 Before the Senate Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983) 17

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-52a) is reported at 589 F. Supp. 1302.

JURISDICTION

The district court's preliminary injunction (App., *infra*, 52a) was entered on June 12, 1984. The district court's order modifying the preliminary injunction on the government's motion for a stay pending appeal (App., *infra*, 53a-59a) was entered on July 20, 1984. Notices of appeal to this Court from the June 12 and July 20 orders were filed, respectively, on June 20, 1984 (App., *infra*, 60a), and August 20, 1984 (App.,

infra, 61a). On August 10, 1984, Justice Rehnquist extended the time within which to docket this appeal to and including October 1, 1984, and on September 11, 1984, he further extended the time for docketing the appeal to and including October 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1252. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 30-31 (1975); *Railway Labor Executives' Ass'n* v. *Gibbons*, 448 U.S. 1301, 1303-1304 & n.2 (Stevens, Circuit Justice), subsequent order, 448 U.S. 909 (1980).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 3404(c) provides:

> The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> (1) shall be determined and paid as prescribed by the Administrator;
>
> (2) shall not exceed $10 with respect to any one claim; and
>
> (3) shall be deducted from monetary benefits claimed and allowed.

38 U.S.C. 3405 provides:

> Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

STATEMENT

By statute, Congress has established an administrative system of service-connected death and disability benefits for veterans. See 38 U.S.C. 301 *et seq*. Since

the time of the Civil War, Congress has limited the amount that a veteran may pay to an agent or attorney for assistance and representation in connection with a claim for such benefits. As relevant here, 38 U.S.C. 3404(c) provides (subject to criminal penalties for receipt of greater sums, see 38 U.S.C. 3405) that "in allowed claims for monetary benefits under laws administered by the Veterans' Administration * * * [s]uch fees * * * shall not exceed $10 with respect to any one claim * * *."[1] Appellees contend that Section 3404(c) violates their Fifth Amendment right to procedural due process and their First Amendment rights of association and free speech and to petition for a redress of grievances.

1. Claims for service-connected death and disability benefits are decided in an informal and nonadversary process.[2] The process is commenced by the submission of a claim for benefits (38 C.F.R. 3.151, 3.152). The necessary claims form is furnished by the Veterans' Administration either upon request or upon receipt of notice of death of a veteran (38 C.F.R. 3.150(a) and (b)). In addition, "[a]ny communication or action, indicating

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[1] Section 3404 is applicable to fees in administrative proceedings. Judicial review of the decision of the Administrator on service-connected death and disability claims is expressly precluded by statute (see 38 U.S.C. 211(a); page 7, *infra*). In contrast, Congress has authorized suits on claims under certain veterans' insurance programs (see 38 U.S.C. 784(a)) and has allowed a fee not to exceed 10% of the amount recovered for representation in such suits (38 U.S.C. 784(g)). The limitation in Section 3404 applies to the fees of an agent or attorney regardless of the nature of the work performed (see *Hines* v. *Lowrey*, 305 U.S. 85, 89 (1938)), but it does not bar reimbursement for expenses incurred in connection with a claim. See 38 C.F.R. 14.634(b).

[2] See generally S. Rep. 97-466, 97th Cong., 2d Sess. 86-87, 126-135 (1982); *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 178-200 (1983).

an intent to apply for one or more [veterans'] benefits * * *, may be considered an informal claim" and, "if a formal claim has not been filed, an application form will be forwarded to the claimant for execution" (38 C.F.R. 3.155(a)). In the event that "a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application" (38 C.F.R. 3.109(a)).

A claim is initially reviewed by the so-called agency of original jurisdiction, which is usually the Regional Office of the Veterans' Administration that is most convenient to the claimant. These proceedings "are ex parte in nature" (38 C.F.R. 3.103(a)) and no government official appears in opposition to the claim. The VA has "the obligation * * * to assist a claimant in developing the facts pertinent to his claim * * *" (*ibid.*), and "[a]ny evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records" (38 C.F.R. 3.103(b)).

The VA is also under an obligation "to render a decision which grants [the claimant] every benefit that can be supported in law while protecting the interests of the Government" (38 C.F.R. 3.103(a)), and "[i]t is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation * * *" (38 C.F.R. 3.102). Furthermore, "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant" (*ibid.*).

> Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records * * *.

Ibid.

A claimant is "entitled to a hearing at any time on any issue involved in a claim * * *" (38 C.F.R. 3.103(c)). The purpose of the hearing is to permit the claimant to present any evidence or arguments that bear on the claim (*ibid.*). "It is the responsibility of the Veterans Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position" (*ibid.*). Likewise, "questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony" (*ibid.*).

The claimant is notified of any decision on his claim, including "the reason for the decision," "the date it will be effectuated," and "the right to a hearing" (38 C.F.R. 3.103(e)). In the event of an adverse decision, the claimant is advised of his right to appeal and the applicable time limits for taking an appeal (*ibid.*; 38 C.F.R. 19.114). An appeal is initiated by filing a notice of disagreement (38 U.S.C. 4005(a); 38 C.F.R. 3.103(e), 19.118), which is "[a] written communication from a claimant or the representative expressing dissatisfaction or disagreement with * * * [the original] determination * * *. It need not be expressed in any special wording" (38 C.F.R. 19.117).

After a notice of disagreement is submitted, the agency of original jurisdiction may reconsider the claim (38 U.S.C. 4005(d)(1); 38 C.F.R. 19.119(a)). If the decision remains adverse to the claimant, he is "entitle[d]

* * * to a [S]tatement of the case for his assistance in perfecting his appeal" (38 C.F.R. 3.103(e); see also 38 C.F.R. 19.119(b)). "The statement of the case should provide the appellant notice of those facts and applicable laws and regulations upon which the agency of original jurisdiction based its determination of the issue or issues. It should be complete enough to allow the appellant to present written and/or oral argument * * * [on appeal]" (38 C.F.R. 19.120(a)). In particular, a statement of the case is required to contain:

> (1) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement.
>
> (2) A summary of the applicable law and regulations, with appropriate citations.
>
> (3) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed.

38 C.F.R. 19.120(b); see also 38 U.S.C. 4005(d)(1). Following receipt of the statement of the case, a claimant perfects his appeal by completing and submitting a form that is provided to him by the VA (see 38 C.F.R. 19.121, 19.123).

Appeals in claims for service-connected death and disability benefits are within the jurisdiction of the Board of Veterans' Appeals (BVA). See 38 U.S.C. 4001, 4004; 38 C.F.R. 19.1, 19.2. The Board undertakes de novo review of the claim; it "exercise[s] the same authority as the department having original jurisdictional responsibility" (38 C.F.R. 19.1(a)) and has "jurisdiction * * * [as] to all questions * * *" (38 C.F.R. 19.112(a); see also 38 U.S.C. 4004(a)).

Upon request, a claimant is entitled to a hearing on appeal (38 C.F.R. 19.157(a)). Hearings are held either in Washington, D.C., or at VA facilities around the country (38 C.F.R. 19.160). "The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue" (38 C.F.R. 19.157(b)). Like the previous proceedings on the claim, hearings before the BVA "are ex parte in nature and nonadversarial" (38 C.F.R. 19.157(c)); although parties are allowed to ask questions, there is no formal cross-examination or rebuttal of evidence, and the rules of evidence do not apply (*ibid.*). The claimant may also be given an opportunity to submit additional evidence following the hearing (38 C.F.R. 19.164).

Based on the record, the Board may allow the claim in whole or in part, deny or dismiss it, or remand for further development (38 C.F.R. 19.180, 19.182). The decision of the BVA on service-connected death and disability claims is final (38 C.F.R. 19.104) and is not subject to judicial review. 38 U.S.C. 211(a); *Johnson* v. *Robison*, 415 U.S. 361 (1974).[3]

2. A claimant is entitled to representation at all stages of the administrative process (38 C.F.R. 3.103(d), 19.150). Such representation may be provided by a member of a recognized organization (as discussed below), an attorney or agent (subject to the fee limitation at issue here), or other person authorized to represent claimants. The VA has prescribed eligibility standards for each of these categories of representatives (see 38 U.S.C. 3401, 3404(a) and (b)); 38 C.F.R. 14.626-14.637, 19.150-19.156) to ensure that claimants "have qualified representation in the preparation, presentation, and prosecution of claims for veterans' benefits" (38 C.F.R. 14.626).

Under 38 U.S.C. 3402(a)(1), Congress has authorized the VA to recognize individuals from certain veterans' and service organizations as representatives "in the preparation, presentation, and prosecution of claims un-

[3] Although the decision of the BVA is final, liberal provisions exist for reconsidering a BVA decision and for reopening a denied claim on the basis of new evidence. See 38 C.F.R. 19.185-19.190, 19.194; see also 38 C.F.R. 3.104, 3.105, 3.156.

der laws administered by the Veterans' Administration."[4] The VA may furnish space and office facilities for the use of paid full-time representatives of such organizations (38 U.S.C. 3402(a)(2)). Recognition may be given to national or state veterans' organizations and to other veterans' organizations that are primarily involved inddelivering services to veterans and that, inter alia, will provide complete claims service and undertake affirmative action, such as training and monitoring of their representatives, to ensure proper handling of claims (38 C.F.R. 14.628(d) (4) and (5), 14.628(e)(4) and (5)). In addition, in order to be recognized, representatives from these organizations must certify that "no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim" (38 U.S.C. 3402(b)(1)).

Pursuant to these provisions, there has developed "a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants." S. Rep. 97-466, 97th Cong., 2d Sess. 50-51 (1982); see also *Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess., Pts. 1 & 2, at 457 (1973). Appellees, dissatisfied with this system of representation, seek to retain private attorneys to pursue their benefit claims before the VA and thus challenge the validity of the fee restriction in 38 U.S.C. 3404(c).

3. This action was filed in the United States District Court for the Northern District of California in April 1983. Plaintiff-appellees are veterans' groups and individual veterans or their surviving spouses; no plaintiff

[4] The statute specifically enumerates the Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, and the Veterans of Foreign Wars. The Administrator may also recognize "such other organizations as he may approve" (38 U.S.C. 3402(a)(1)).

class was requested or certified. Appellees alleged that the $10 fee limitation prevents veterans from retaining attorneys and that, in the absence of such representation, the administrative claims system is fundamentally unfair and denies veterans their Fifth Amendment right to procedural due process and their First Amendment rights of association and free speech and to petition for a redress of grievances. Following extensive discovery by appellees,[5] the district court concluded that appellees "have a high probability of success" on their constitutional arguments (App., *infra*, 6a; see also *id.* at 40a, 41a, 47a, 48a) and entered a preliminary injunction against enforcement of 38 U.S.C. 3404 and 3405.[6]

With respect to the procedural due process issue, the district court recognized (App., *infra*, 6a) that both this Court, summarily affirming the decision of a three-judge district court, and the Ninth Circuit had sustained the constitutionality of 38 U.S.C. 3404(c). *Gendron* v. *Levi*, 423 U.S. 802, aff'g *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975); *Demarest* v. *United States*, 718 F.2d 964 (1983), cert. denied, No. 83-1176 (Apr. 23, 1984). The court sought to distinguish these decisions, however, on the ground that they involved challenges to Section 3404 on its face and did not preclude an attack on the statute "as applied to the

[5] As the district court recognized, appellees' discovery in this case has been "extensive" (App., *infra*, 12a) and involves "a great deal of evidence" (*ibid.*), including depositions of seven VA officials and interrogatories and requests for documents that led to the government's production of more than 25,000 pages of material. Appellees themselves acknowledge that they engaged in "six months of extensive discovery" (Br. in Opp. to Stay 1).

[6] The district court had previously denied the government's motion to dismiss the complaint, finding that appellees had stated a claim under both the Due Process Clause of the Fifth Amendment and the First Amendment.

facts of this case" (App., *infra*, 10a; see also *id.* at 7a n.7, 14a, 15a). The court remarked that "[i]t is particularly important to conduct a careful inquiry into a statute's application to all the facts at hand where that statute is being challenged as violative of procedural due process" (*id.* at 11a), and it noted (*id.* at 12a) that appellees

> have engaged in extensive discovery * * * [and] have gathered a great deal of evidence regarding the way the claims process functions and whether it tends to be adversarial, the extent to which VA employees or service organization representatives are able to aid veterans in gathering supporting materials and presenting their claims, the special difficulties posed by such complex claims as those relating to Agent Orange or radiation-related illnesses, the way in which the lack of an attorney renders veterans unable to present their claims adequately, and the financial hardship imposed on veterans by the $10.00 limit. They have also presented statistical evidence regarding the success rates of various types of * * * claims before the several levels of the VA.

Based on that evidence, the district court determined that, while the VA process was designed to be informal and nonadversarial (App., *infra*, 32a-33a), "both the procedures and the substance entailed in presenting * * * claims to the VA are extremely complex" (*id.* at 30a) and "particularly so with respect to those claimants seeking to obtain benefits for deaths or disabilities arising from such causes as exposure to atomic radiation or Agent Orange, or from Post Traumatic Stress Syndrome" (*id.* at 32a). The court also concluded that, because of resource limitations, neither service organization personnel representing claimants nor VA employees are able to devote the same time and resources to a case that a retained attorney would (*id.* at 27a, 33a, 36a, 37a-38a). As the court explained (*id.* at 33a, 37a-38a):

> [N]either the VA officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to claimants. Even assuming that all VA personnel were prepared to do everything that they could to build claimants' cases for them, it is clear that the resources of the VA are insufficient to permit the substantial investment of time that would be necessary.
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> \ * * * * *
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> [Appellees] do not deny that such [service] organizations provide substantial service, but argue simply that due to these organizations' limited resources, they are unable to provide the full array of services which a paid attorney might provide. * * * Given the very limited extent to which either the VA personnel or service organization representatives are able to assist veterans or their families in bringing service-related death and disability claims, the vast substantive and procedural complexities facing such claimants, and the important need of such claimants, the $10.00 fee limitation deprives plaintiffs of the ability to make a full presentation of their claim to the VA.

The district court also held that, independently of the Due Process Clause, the First Amendment entitles the individual appellees to "meaningful" (App., *infra*, 45a) and "effective" (*ibid.*) access to the VA and protects the right of the organizational appellees to "provid[e] adequate legal services to their members" (*id.* at 40a). The court determined (*id.* at 47a) that appellees "have submitted vast numbers of depositions, declarations, and documents demonstrating that claimants' inability to employ counsel for a fee of more than $10.00 severely impedes their efforts to investigate and present their death and disability claims to the VA." Finding that *Gendron* and *Demarest* had not presented First Amendment challenges to Section 3404(c) (App., *infra*, 40a-41a), the court concluded that appellees had "shown

a high probability of success on their First Amendment claim" (*id.* at 48a).

Finally, the district court held that appellees had demonstrated that they would suffer irreparable injury if a preliminary injunction were denied and that the balance of hardships between the parties was in their favor (App., *infra*, 48a-51a). Accordingly, the district court entered a broad preliminary injunction against enforcement of Sections 3404(c) and 3405; that injunction is of nationwide scope, is not limited to the appellees in this case, is not confined to unusually complex or complicated cases, and is not otherwise restricted to instances in which the court believed that the claims procedure would be unfair or inadequate in the absence of a retained attorney. In addition, the court required the VA to take various affirmative steps to remove references to the fee limitation in its forms and other documents and to post a summary of the preliminary injunction in VA offices across the country. App., *infra*, 52a. On the government's motion for a stay pending appeal, the district court modified the injunction with regard to certain provisions concerning implementation, but in all other respects it denied a stay. App., *infra*, 53a-59a.

On September 27, 1984, Justice Rehnquist granted the government's application for a stay of the district court's injunction pending direct appeal to this Court.

THE QUESTION IS SUBSTANTIAL

The district court has held unconstitutional a century-old federal statute that has previously been sustained by both this Court and other courts. Moreover, Congress has repeatedly examined the fee limitation and, as recently as the current Congress, has adhered to it. Notwithstanding this well-considered policy, the court below reviewed the operation of the VA claims system and set aside the statute on the basis of its conclusion—contrary to the determination of Congress—that the system is adversarial in nature and

that the VA and the veterans' service organizations do not provide adequate representation to claimants. In thus holding that the right to retain an attorney without regard to the statutory fee limitation is necessary to a fundamentally fair administrative procedure, the district court followed an erroneous method of analysis and reached an incorrect result. Accordingly, review by this Court is warranted.

1. a. Both this Court's ruling in *Gendron* and the Ninth Circuit's recent decision in *Demarest* have upheld the validity of 38 U.S.C. 3404(c) under the Due Process Clause.[7] Indeed, as we pointed out in our motion to affirm in *Gendron*, *supra*, at 3-4, and our brief in opposition in *Demarest*, *supra*, at 3, 6 n.11, every court to consider the issue (now with the exception of the court below) has held that Section 3404(c) is constitutional, and this Court has consistently denied certiorari.[8] The decision below is plainly at odds with this line of authority.[9]

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[7] Of course, this Court's summary affirmance in *Gendron* constitutes a ruling on the merits. See *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979); *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 74 (1976); *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975).

[8] See also *United States* v. *Marks*, 26 F. Cas. 1162 (C.C.D. Ky. 1869) (No. 15,721), and *United States* v. *Fairchilds*, 25 F. Cas. 1035 (W.D. Mich. 1867) (No. 15,067), cited in *United States* v. *Hall*, 98 U.S. 343, 356 (1878). Copies of the jurisdictional statement, the motion to affirm, and the reply brief in *Gendron*, and the brief in opposition in *Demarest*, were served on counsel for appellees as attachments to our application in this Court for a stay pending appeal.

[9] The court below sought (App., *infra*, 12a-13a) to distinguish *Gendron* on the ground that, in contrast to the instant case, the plaintiff there "presented no evidence that service organization representation was inadequate or that the veteran's claim was particularly complex." As the court elsewhere recognized, however (*id.* at 9a n.9), the jurisdictional statement in *Gendron* specifically presented the question whether "the District Court

Moreover, the predecessor of Section 3404(c) was enacted in 1862, and a strict limitation on fees for retained counsel in VA claims proceedings has been in place since that time.[10] The absence of a successful challenge to the fee limitation during that period is telling evidence against the district court's novel holding. Congress has also repeatedly revisited the fee limitation and, most recently in 1983, decided to leave that policy in force. See *Gendron* Mot. to Aff. 7 n.9; *Demarest* Br. in Opp. 7. The usual presumption of constitutionality of Acts of Congress, especially in light of the longstanding and recently reaffirmed adherence by Congress to the fee provision, substantially undermines the decision below. See, *e.g.*, *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 3, 6-7; *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32 (1963); cf *Hurtado* v. *United States*, 410 U.S. 578 (1973); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959).

b. In our view, the district court's basic approach in this case misconceived the proper role of the judiciary and its relationship to the legislative branch of govern-

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improperly refuse[d] to receive evidence * * * that private veterans' organizations and their lay persons do not provide adequate representation * * *." See *Gendron* J.S. 5. Indeed, the jurisdictional statement repeatedly raised issues concerning the adequacy of representation by service organizations and the complexity of veterans' claims (*id.* at 6-7, 9 & n.4, 10, 12, 20, D2). The same points were reiterated in the reply brief at the jurisdictional stage (at 4-5, 6, 7, 8-9). We also note that the three-judge district court in *Gendron*, unlike the court in this case (see pages 9-12, *supra*, and 16-20, *infra*), relied on Congress's evaluation of the nature and operation of the VA claims system (389 F. Supp. at 1307) and did not independently take evidence on that issue. Thus, *Gendron* and the decision below are fundamentally in conflict.

[10] The history and development of the statutory fee limitation is traced in the appendix to our motion to affirm in *Gendron* and in our brief in opposition in *Demarest* (at 4 n.3).

ment. In setting aside the fee limitation, the court below disregarded the congressional choice to establish an informal and nonadversarial system for resolving veterans' benefits claims, and its decision will significantly alter the basic nature of the claims process. Moreover, Congress has inquired into and assessed the nature and operation of the VA claims procedure, and the court erred in ignoring Congress's determinations and undertaking an independent factual review of the benefit system.

The VA claims system has been described above (see pages 3-8, *supra*). The veterans' benefit statute and implementing regulations make clear that the system is designed to be an informal and nonadversarial process. It cannot be doubted that Congress, in creating a statutory benefit program, may depart from the traditional litigation model for adjudicating claims and instead follow an alternative approach in which lawyers are not necessary to a fair procedure. This is precisely what Congress has done here. If, as the district court believed, the claims system is fundamentally unfair because it is operating in a more formal and adversarial fashion than Congress intended, the appropriate remedy would be to require that the system conform to the congressional directive, not to invalidate the fee limitation and thereby work a further deviation from Congress's purpose. By striking down the fee limitation in order to increase the participation of lawyers in the VA process, the district court's action can only result, contrary to Congress's intent, in an even more formal and adversarial claims process.

Furthermore, as explained in our motion to affirm in *Gendron* (at 4-7) and our brief in opposition in *Demarest* (at 3-4, 7), Congress's consistent adherence to the fee limitation over the years reflects its assessment that the existing system is, in fact, an informal and nonadversarial process in which the VA and service

organizations provide free assistance to the veteran in understanding the proceedings and presenting his claim. For example, as recently stated by the Senate Committee on Veterans' Affairs:

> Many of the VA's internal procedures, particularly in the area of adjudication of claims, have developed over the years in such a way as to afford to VA claimants some advantages not afforded to claimants before other agencies. Advantages most often cited are the VA's very liberal standards for the admission of evidence, and free representation before the VA by skilled officers of the various national veterans' service organizations—advantages whi are often credited for the informal, "nonadver ial" nature of VA proceedings.
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> * * * [The Committee has] abiding respect * * * for the high quality of representation offered by the veterans' service organizations * * *.
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> * * * [T]he Committee is concerned that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters. The mainstays of that network are veterans' service officers, employees of national veterans' service organizations, and other organizations approved pursuant to present section 3402 of title 38, who provide representation without charge to veterans and other claimants before the VA, without regard to whether the individual claimant is a member of the service officer's organization. It is widely recognized, as the VA noted * * *[,] that veterans' service officers "render sophisticated and expert assistance in prosecuting a claim", and the Committee strongly believes that the availability of their services should be maintained and fostered.

S. Rep. 97-466, 97th Cong., 2d Sess. 25, 49-50, 50-51 (1982); see also, *e.g.*, *id.* at 19, 32, 63; 129 Cong. Rec. S1897 (daily ed. Mar. 1, 1983) (remarks of Sen. Simpson); *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing on S. 636 Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 67, 139 (1983). In addition, Congress was informed that claimants represented by service organizations have virtually the same rate of success—and in some instances a higher rate—than claimants represented by an attorney (*id.* at 67, 237, 252-256, 259; see also S. Rep. 96-178, 96th Cong., 1st Sess. 101 (1979)). Thus, Congress has recognized the nonadversarial nature of the claims process and the expert representation provided by service organizations without charge. See *Staub* v. *Johnson*, 519 F.2d 298, 300 (D.C. Cir. 1975).[11]

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[11] It is particularly significant that the recent proposal in Congress to amend Section 3404(c) (which was adopted in the Senate but failed to pass the House) would have left standing the $10 fee limitation for administrative proceedings through decision by the BVA and would have allowed greater fees only for subsequent administrative stages (such as motions to reconsider or reopen) and suits for judicial review (as authorized in the bill). See S. Rep. 98-130, 98th Cong., 1st Sess. 22, 23, 48-50 (1983); S. Rep. 97-466, 97th Cong., 2d Sess. 23, 49-54 (1982). As the Senate Committee on Veterans' Affairs explained (*id.* at 50):

> The Committee, in its consideration of the issue of attorneys' fees also recognized that the existing limit on attorneys' fees is generally appropriate with respect to the initial claims stage in the sense that applying for VA benefits is a relatively uncomplicated procedure, with the VA generally securing the relevant military records as well as evaluating the merits of the claim. In light of the availability of national service officers and other nonlegal forms of free assistance, there would seem to be no need for the as-

Despite Congress's determination of legislative fact regarding the operation of the VA claims system, the district court simply disregarded the legislative assessment and, based on the record developed in this litigation, undertook to re-weigh essentially the same contentions that had been presented to Congress and to make de novo findings on the same issues concerning the general workings of the claims process. This was not within the district court's province. To be sure, it is the ultimate responsibility of the judiciary to decide whether the constitutional standards of due process are satisfied.[12] But in addressing that question, the courts

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sistance of an attorney in order to initiate the claims process by completing and filing an application. Moreover, even if the initial decision is adverse, the Committee believes that it may be unnecessary for a claimant to incur the substantial expenses for attorney representation that may be involved in appealing the case for the first time to the BVA. The claimant may well prevail, as many claimants currently do, without legal representation when the case is first before the BVA. However, once the BVA renders a decision adverse to the claimant on the merits, the need for the assistance of an attorney is then markedly greater with respect to such issues as seeking a reopening and reconsideration and deciding whether to proceed to court. Thus, continuing to discourage attorney representation at the initial application, decision and appeal stages would, the Committee believes, appropriately serve to protect claimant's benefits without prejudicing the claimant's ability to obtain effective legal representation at a later point.

See also *id.* at 51-52.

[12] Even in making that legal determination, courts should give substantial weight to the views of Congress and the responsible agency concerning the procedures necessary to ensure fairness in the administrative process. See *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976); *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973); *Arnett* v. *Kennedy*, 416 U.S. 134, 202 (1974) (White, J., concurring in part and dissenting in part); see also *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981); *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980) (plurality opinion).

are not free to ignore the legislature's findings concerning those subjects of broad and general applicability—such as are involved in understanding and evaluating the nature of the VA claims procedure—that are not matters of historical or adjudicative fact and do not lend themselves to resolution through the judicial process in litigation between two parties. Where, as here, a broad challenge is made to the constitutionality of a federal statute, the validity of the statute does not vary from case to case and district to district depending upon the record that the parties develop in the particular lawsuit.

Of course, in discharging its legislative function, Congress is not required to make findings of fact. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980); *Katzenbach* v. *McClung*, 379 U.S. at 299, 304. But where Congress has done so, due regard for the proper separation of powers and for the superior ability of the legislature to gather information and analyze issues of legislative fact (see, *e.g.*, *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504-505 (1975); *Branzburg* v. *Hayes*, 408 U.S. 665, 693-694 (1972)) requires that courts defer to Congress's determinations unless those determinations can be said to be irrational. See, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 26 n.18; *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Rostker* v. *Goldberg*, 453 U.S. 57, 74, 81-83 (1981); *Vance* v. *Bradley*, 440 U.S. 93, 106, 111 (1979); *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976); *Firemen* v. *Chicago, R.I. & P.R. R.* 393 U.S. 129, 136, 138-139 (1968); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594 (1939). Indeed, this principle is particularly appropriate on issues of procedural fairness, since "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the

generality of cases, not the rare exceptions." *Mathews* v. *Eldridge*, 424 U.S. 319, 344 (1976).

Judged under the correct legal standards, it is clear that Section 3404(c), viewed in the context of the nonadversarial claims system (see *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971)) in which veterans are provided expert representation by service organizations without charge, does not deny fundamental fairness. This Court has recognized that a lawyer (whether retained or appointed) is not always necessary to a fair proceeding and that the interest in being represented by counsel in a given procedural setting must be assessed in light of competing societal considerations. See *Lassiter* v. *Department of Social Services*, 452 U.S. 18 (1981); *Baxter* v. *Palmigiano*, 425 U.S. 308, 312, 314-315 (1976); *Goss* v. *Lopez*, 419 U.S. 565, 583 (1975); *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 787-788 (1973); *Vitek* v. *Jones*, 445 U.S. 480, 499-500 (1980) (Powell, J., concurring in part); cf. *Schweiker* v. *McClure*, 456 U.S. 188, 199 n.14 (1982); *Parham* v. *J.R.*, 442 U.S. 584, 607 (1979). Contrary to the decision below, the Due Process Clause "'is not so rigid as to require that significant interests in informality, flexibility and economy must always be sacrificed'" (*Lassiter* v. *Department of Social Services*, 452 U.S. at 31 (citation omitted)).[13]

[13] The district court heavily relied (see pages 10-11, *supra*) on its view that the VA and the service organizations have inadequate resources to provide the same level of preparation and assistance to every claimant that a privately retained representative would. Even assuming that to be true, however, the court's concern would not implicate a right to *counsel*; presumably a Legal Services attorney (who would not charge a fee and thus would not be constrained by Section 3404(c) from representing a client), or indeed a representative from a service organization who happens to be a lawyer, would labor under the same sorts of institutional and resource limitations. A right to

The fee limitation in Section 3404(c) serves several legitimate purposes. For example, it "protect[s veterans] and secure[s] to them the use of the [payments] granted in their behalf" by ensuring that such funds "inure solely to the benefit of the [veteran]" and are not diminished by lawyer's fees. *United States* v. *Hall*, 98 U.S. 343, 353 (1878); see also *United States* v. *Fairchilds*, 25 F. Cas. 1035, 1037 (W.D. Mich. 1867) (No. 15,067). Similarly, the limitation "protect[s] just claimants from extortion or improvident bargains" in their dealings with unscrupulous attorneys (*Calhoun* v. *Massie*, 253 U.S. 170, 173 (1920)) and thus prevents overreaching and sharp practices. See *Staub* v. *Johnson*, 519 F.2d 298, 300 (D.C. Cir. 1975); *United States* v. *Marks*, 26 F. Cas. 1162, 1163 (C.C.D. Ky., 1869) (No. 15,721). And, by eliminating any possible incentive for counsel to bring unwarranted claims, it guards "the Treasury from frauds and imposition" (*Calhoun* v. *Massie*, 253 U.S. at 173).

In addition, the fee limitation is an important part of the informal and nonadversarial system that Congress has established to process a high volume of largely fact-bound claims fairly and efficiently.[14] Cf. *Mathews* v. *Eldridge*, 424 U.S. at 348. By restricting the participation of lawyers, the fee limitation helps to ensure the informality and nonadversarial nature of the claims process. Compare, *e.g.*, *Wolff* v. *McDonnell*, 418 U.S.

counsel must rest on the special capabilities of an attorney and cannot be invoked to further other objectives that have little if anything to do with the role of lawyers. See *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 10-11.

[14] In 1983, nearly 3 million cases involving service-connected death and disability claims (as well as more than 1.5 million non-service-connected claims, which are subject to the same administrative procedures and fee limitation) were on the VA rolls. Moreover, the Board of Veterans' Appeals decided over 38,000 cases in 1983 and had approximately 64,000 appeals pending at the end of the year. 1983 VA Ann. Rep. 63, 113-114.

at 570; *Gagnon* v. *Scarpelli*, 411 U.S. at 787-788. Rather than viewing the fee limitation in the context of the overall system, the court below examined it in isolation and thus ignored the substantial interests it serves.

In effect, Congress has set up an alternative dispute resolution procedure in which lawyers are not necessary to a fair determination of benefit claims. Furthermore, because VA benefits are "gratuities" (*Lynch* v. *United States*, 292 U.S. 571, 577 (1934)) that are paid entirely from public funds and do not involve financial contributions from veterans, Congress should be accorded particularly wide latitude to structure the process by which claims are adjudicated and benefits paid. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134, 151-155 (1974) (plurality opinion); *Calhoun* v. *Massie*, 253 U.S. at 176. The district court erred in striking down this legislative "experiment" in claims procedure and in substituting a claims adjudication regime that Congress has repeatedly rejected. See *Parham* v. *J.R.*, 442 U.S. at 608 n.16; *Whalen* v. *Roe*, 429 U.S. 589, 598 (1977).[15]

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[15] Because the district court's preliminary injunction rests on an error of law, it is subject to plenary review by this Court. See *Withrow* v. *Larkin*, 421 U.S. 35, 46, 55 (1975); *Houchins* v. *KQED*, 429 U.S. 1341, 1344 (1977) (Rehnquist, Circuit Justice); *Delaware & H. Ry.* v. *United Transportation Union*, 450 F.2d 603, 620 (D.C. Cir.) (Leventhal, J.), cert. denied, 403 U.S. 911 (1971); 7 *Moore's Federal Practice* ¶ 65.21, at 65-154 & n.26 (1984). Likewise, on an appeal from a preliminary injunction, the Court has jurisdiction to review the denial by a district court, as in this case (see page 9 note 6, *supra*), of a motion to dismiss the complaint. See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 286-287 (1940); *Energy Action Educational Foundation* v. *Andrus*, 654 F.2d 735, 745-746 & n.54 (D.C. Cir 1980), rev'd on other grounds *sub nom. Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981); *FTC* v. *Cinderella Career & Finishing Schools, Inc.*, 404 F. 2d 1308, 1310-1311 (D.C. Cir. 1968).

To be sure, it could be argued that the $10 fee limitation has become obsolete and that a higher figure would be appropriate. Likewise, some would consider another form of limitation—such as a percentage of the benefit award rather than an absolute dollar amount—to be preferable as a matter of policy. Such arguments, however, must be addressed to Congress rather than to the courts.[16] Congress has in fact considered these issues

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Of course, it is often appropriate for an appellate court to review a preliminary injunction under a deferential "abuse of discretion" standard where, for example, the need for an expeditious ruling at the trial level limits the analysis of relevant legal issues or precludes the development of a full factual record on which the outcome of the controversy will turn. See, *e.g.*, *University of Texas* v. *Camenisch*, 451 U.S. 390, 394-396 (1981); *Brown* v. *Chote*, 411 U.S. 452, 456-457 (1973). Such a standard is inapplicable here, however. The district court's order is premised on a decisive legal error, appellees engaged in extensive discovery to support their request for an injunction, and the court had ample opportunity to consider the issues and write a lengthy opinion. Moreover, the district court's decree, while formally a preliminary injunction, is an exceedingly broad order (see page 12, *supra*) that does not simply preserve the status quo pending trial (see 7 *Moore's Federal Practice* ¶ 65.04[1], at 65-36 (1984); *Camenisch*, 451 U.S. at 395) but instead changes the status quo and grants the complete affirmative relief that would be sought in a permanent injunction. And we are advised by the Assistant United States Attorney that the issue of a permanent injunction probably would not be resolved by the district court for a year or more, and therefore the preliminary injunction in this case, unlike in many other cases, was intended to be in effect for an extended period. In these circumstances, there is no obstacle to the Court's review on the merits of the legal validity of the injunction entered below.

[16] See, *e.g.*, *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984), slip op. 11; *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981); *Harris* v. *McRae*, 448 U.S. 297, 325-326 (1980); *Bell* v. *Wolfish*, 441 U.S. 520, 542 n.25 (1979); *James* v. *Strange*, 407 U.S. 128, 133 (1972); *Heart of Atlanta Motel* v. *United States*, 379 U.S. 241, 261-262 (1964).

and has consistently adhered to the provision that appellees seek to overturn in this litigation. Congress's choice among available alternatives, and the wisdom of its policy, are not matters for constitutional adjudication.[17]

2. The district court also erred in concluding that Section 3404(c) violates appellees' First Amendment rights of association and speech and to petition for a redress of grievances.

We do not believe that this case presents a First Amendment issue that is separate and independent from the due process question. The First Amendment decisions relied on by the district court rest on the need for "effective" and "meaningful" representation. *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 584-585 (1971). In those cases, it was clear that the assistance of counsel was required in order adequately to pursue the legal rights involved. Here, on the other hand, if the existing VA claims procedure is fair and adequate without privately retained attorneys, there is no basis in the First Amendment for inferring a right to counsel as necessary to effectuate the freedoms of association, speech, and petition for redress. Moreover, Section 3404(c) does not prevent veterans from associating or petitioning, or veterans' organizations from furnishing supporting services (including legal advice and representation), provided only that the claimant is not charged more than $10. Cf. *Minnesota Bd. for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 16-18. This statute is a far cry from the situations presented in the cases cited by the district court, and nothing in those decisions suggests that the

[17] For the reasons stated in our motion to affirm in *Gendron*, at 8-9, and our brief in opposition in *Demarest*, at 5 & n.8, we also submit that the court below incorrectly held (App., *infra*, 15a-19a) that initial applicants for VA benefits have a property interest protected by the Due Process Clause.

fee limit is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge.[18]

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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[18] The district court's ruling is also inconsistent with *Staub* v. *Roudebush*, 424 F. Supp. 1346, 1349 (D.D.C. 1976), vacated and remanded for lack of standing, 574 F.2d 637 (D.C. Cir. 1978) (Table), which rejected an indistinguishable First Amendment challenge to Section 3404(c).

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-1861-MHP

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, A CALIFORNIA NON-PROFIT CORPORATION; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, A CALIFORNIA NON-PROFIT CORPORATION; DON E. CORDRAY, AN INDIVIDUAL; ALBERT R. MAXWELL, AN INDIVIDUAL; REASON F. WAREHIME, AN INDIVIDUAL; DORIS J. WILSON, AN INDIVIDUAL,
PLAINTIFFS,

vs.

HARRY N. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATON; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, DIRECTOR, SAN FRANCISCO REGIONAL OFFICE, THE VETERANS ADMINISTRATION,
DEFENDANTS.

OPINION

I. INTRODUCTION

Plaintiffs, who were veterans organizations, veterans, and a veteran's widow, seek a preliminary injunction enjoining the enforcement of 38 U.S.C. §§ 3404-3405.[1] These sections impose a flat $10.00 fee limit for all work performed by an attorney in repre-

[1] Plaintiffs have also asked the court to enjoin the VA from violating its own regulations. (Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction at 23). However, as this claim is not contained in plaintiff's complaint it is not properly before the court and is not considered.

senting a veteran pursuing Service-Connected Death and Disability ("SCDD") claims, 38 U.S.C. § 301 *et seq.*, before the Veterans Administration ("VA").[2] Section 3404 limits fees for attorneys and claims agents to $10.00 per successful claim:

> (c) The administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> (1) shall be determined and paid as prescribed by the Administrator;
>
> (2) shall not exceed $10 with respect to any one claim; and
>
> (3) shall be deducted from monetary benefits claimed and allowed.

Section 3405 subjects an attorney to possible imprisonment at hard labor or a fine if she independently seeks to charge a fee in excess of the $10.00 provided by the VA for successful claims:

> Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, . . . shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

Plaintiffs argue that the application of the $10.00 fee limit imposed by 38 U.S.C. §§ 3404-3405 is unconstitutional because it deprives them of their right to procedural due process under the Fifth Amendment of the United States Constitution and their First Amendment rights to petition for redress of grievances and to associate freely. They do not suggest that the government is obliged to appoint an attorney to act on their behalf,

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[2] *See also* 38 C.F.R. § 14.634(a) (regulations implementing fee limitation).

but argue that the due process clause and First Amendment of the Constitution proscribe the government from preventing veterans from hiring their own qualified attorneys to represent them in pursuing SCDD benefits.

Plaintiffs are all either veterans' organizations, members of which have pending SCDD claims before the VA, or individuals who were prevented from obtaining an attorney to represent them in their claims before the VA because of the $10.00 limit. The plaintiff class includes both recipients of benefits who have been threatened with termination and applicants for benefits. Plaintiff National Association of Radiation Survivors ("NARS") is an organization of veterans whose purpose is to obtain health care, compensation, and other benefits for its members and their families. Its members are veterans who participated in atomic bomb tests, and many have pending SCDD claims. Plaintiff Swords to Plowshares Veterans Rights Organization ("Swords to Plowshares") is a veterans organization which focuses its efforts on Vietnam veterans. Some of its staff and many of its clients are recipients or applicants for SCDD benefits. Plaintiff Albert R. Maxwell alleges that as a prisoner of war during World War II he was exposed to radiation from the Hiroshima and Nagasaki bombs, causing him to contract cancer and other disorders and causing four of his five children to die of rare congenital abnormalities in early childhood. His claims for radiation-related ailments were denied. Although he contacted an attorney to represent him the attorney declined because of the $10.00 fee limitation. Plaintiff Reason F. Warehime was part of a clean-up detail to Nagasaki and present at an atomic test which he alleges caused a variety of ailments. When his disability rating was lowered from 100% to 60% by the VA he contacted several attorneys to challenge this change, but was unable to obtain representation because of the $10.00

limit. Plaintiff Doris Wilson, finally, is the widow of a veteran whose ship was allegedly contaminated by radiation and who subsequently died of cancer. Ms. Wilson attempted to hire an attorney to represent her in her husband's claim for SCDD but failed due to the $10.00 limit. The claim was denied.[3]

Defendants are the VA, its Administrator, Walters, and its San Francisco Regional Director, Ising.

While 38 U.S.C. § 211(a) provides that VA decisions concerning veterans' benefits are final, and while this provision has been construed to prohibit judicial review of the VA's handling of benefit claims, the section does not bar constitutional challenges to the veterans' benefits laws. *Demarest* v. *United States*, 718 F.2d 964, 965-66 (9th Cir. 1983). Accordingly, § 211(a) does not deny this court jurisdiction over plaintiffs' case. Nor did this court find it appropriate to dismiss plaintiffs' case for failing to state a claim upon which relief could be granted. *National Association of Radiation Survivors, et al.* v. *United States, et al.*, No. C-83-1861 (N.D. Cal. Oct. 21, 1983).[4]

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[3] Don Cordray, one of the original plaintiffs, is now deceased. Cordray allegedly contracted cancer and other ailments from exposure to radiation during atomic testing while on duty in the Navy, but was denied compensation by the VA. He alleged that he wanted to retain an attorney to represent him in his claim before the VA, but was prevented from doing so by the $10.00 fee limitation. In light of the presence of numerous other plaintiffs Cordray's death does not render this lawsuit moot.

[4] The court's earlier order relates to defendants' motion to dismiss plaintiffs' procedural due process claim on the ground that the Supreme Court has already upheld the constitutionality of the fee limitation and also to dismiss the First Amendment claim on the ground that plaintiffs' rights to petition, speech, and association and to meaningful access to the VA do not give rise to a right to representation by an attorney.

For the reasons set forth below the court now grants plaintiffs' motion for preliminary injunction.[5]

II. STANDARD FOR OBTAINING PRELIMINARY INJUNCTIVE RELIEF

The Ninth Circuit has held that preliminary injunctive relief is available where the moving party establishes either "a combination of probable success and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co., Inc.*, 526 F.2d 86, 88 (9th Cir. 1976) (emphasis omitted), *quoting Charlie's Girls, Inc.* v. *Revlon, Inc.*, 483 F.2d 953, 954 (2d Cir. 1973). While, as demonstrated below, plaintiffs are entitled to injunctive relief under either standard, this court will tailor its analysis to the more traditional standard, looking to plaintiffs' probability of success and the possibility of irreparable injury.[6]

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[5] At oral argument attorneys for both plaintiffs and defendants agreed that this was a motion solely for preliminary injunctive relief and not for permanent injunctive relief.

[6] The validity of the Ninth Circuit's alternative criteria for injunctive relief, which require a party to demonstrate only that her claim raises serious questions of law and that the balance of hardships tips strongly in her favor, is uncertain in light of recent rulings by the Supreme Court. *See City of Los Angeles* v. *Lyons*, ___ U.S. ___, 103 S. Ct. 1660, 1666 (1983); *Weinberger* v. *Romero-Barcelo*, ___ U.S. ___, 102 S. Ct. 1798, 1802-03 (1982).

The Ninth Circuit's holding in *Beltran* v. *Myers*, 677 F.2d 1317, 1320 (9th Cir. 1982), that "the greater the relative hardship to the moving party, the less strong need be the showing of probable success that is required [to obtain a preliminary injunction]" does not really affect plaintiffs' burden of proof in the instant case. As discussed below, plaintiffs' claims of hardship are closely linked with their claim of probable success on the merits, and thus easing plaintiffs' burden on the probable success factor because they have made a substantial showing of hardship would not ease their overall burden.

III. PLAINTIFFS' LIKELIHOOD OF SUCCESS ON THE MERITS

A. Does the $10.00 limit violate plaintiffs' right to procedural due process?

In considering procedural due process claims a court must look first to whether plaintiff has a protected liberty or property interest in the benefits which are sought. If plaintiff has such an interest the court must determine what process is due and whether the procedures used meet the requirements of the due process clause. *Mathews* v. *Eldridge*, 424 U.S. 319, 332-35 (1976); *Devine* v. *Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980). As discussed below, this court finds that plaintiffs have a high probability of success on their due process claim.

1. *Has the $10.00 limit already been definitively upheld against due process challenges?*

Defendants argue that the Supreme Court and the Ninth Circuit have already determined that the $10.00 limit does not violate plaintiffs' due process rights, *citing Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975), *aff'd per curiam sub nom. Gendron* v. *Levi*, 423 U.S. 802 (1975); and *Demarest* v. *United States*, 718 F.2d 964 (9th Cir. 1983).[7] Yet, while both *Gendron* and

[7] In defendants' motion to dismiss they also cited a number of other cases to support the proposition that the due process issue had already been decided against plaintiffs: *Hines* v. *Lowrey*, 305 U.S. 85 (1938); *Margolin* v. *United States*, 269 U.S. 93 (1925); *Calhoun* v. *Massie*, 253 U.S. 170 (1920); *Hoffmaster* v. *Veterans Administration*, 444 F.2d 192 (3d Cir. 1971) (per curiam); *Staub* v. *Roudebush*, 424 F. Supp. 1346 (D.D.C. 1976), *vacated and remanded sub nom. Staub* v. *Johnson*, 574 F.2d 637 (D.C. Cir. 1978); and *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio 1971). None of these cases are determinative of plaintiffs' claim. The older Supreme Court cases, *Calhoun*, *Margolin* and *Hines* are distinguishable. They were challenges by attorneys seeking to collect more than the statutory fee, not

Demarest held that the $10.00 fee limitation did not deny plaintiffs their due process rights, the cases do not determinatively hold either that plaintiffs in the instant case do not have a protectible property interest, or that the procedures provided by the VA are adequate to protect such a property interest.

a. Do *Gendron* and *Demarest* hold that veterans' claims to SCDD benefits are not protected property interests?

Gendron, a veteran's challenge to the $10.00 fee limitation on procedural due process and equal protection grounds, was tried on a meager set of stipulated facts. The district court initially dismissed for want of a substantial federal question. Following the Ninth Circuit's reversal and remand with instructions to convene a three-judge court, 501 F.2d 1087 (9th Cir. 1974), the district court upheld the constitutionality of the $10.00 limitation on the ground that an applicant for benefits, unlike a recipient threatened with termination, has no property interest in benefits. Although the analysis was not necessary to its conclusion, the district court also

veterans as here, and they were based on a substantive rather than procedural due process theory. *Hoffmaster* and *Holley* simply relied on those earlier cases without recognizing this distinction. Finally, defendants apparently fail to realize that the district court opinion in *Staub*, upholding the statute, was vacated and thus has no precedential value whatsoever. In remanding the case the Circuit Court for the District of Columbia specifically instructed the district court to "examine the present system, and especially the nature of VA proceedings and the availability and adequacy of the free counsel provided by the service organizations." 519 F.2d 298, 302. As discussed *infra* in text, it is this sort of detailed factual analysis that this court has determined it must conduct. While, on remand in *Staub*, the district court again dismissed plaintiff's claim, 424 F. Supp. 1346 (D.D.C. 1976), on appeal the court of appeals vacated and remanded that decision once again, without publishing its reasons. 574 F.2d 637 (D.C. Cir. 1977).

seemed to conclude that even if such a right existed the procedures were adequate to protect them, in light of the consideration which Congress had given to the problem. 389 F. Supp. at 1307.[8]

Plaintiff appealed this determination to the Supreme Court, presenting the following questions in the jurisdictional statement:

> 1. Is there a deprivation of property within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States when the Veterans Administration denies a disabled veteran's claim for disability benefits under 38 U.S.C. §§ 310-13?
>
> 2. Does 38 U.S.C. § 3404, which limits to $10.00 the fee a retained attorney may receive for consulting with a veteran, or for preparing, presenting, and prosecuting the claim of a veteran seeking disability benefits under laws administered by the Veterans Administration, deprive veterans of property without due process of law, because a veteran is entitled to procedural protection of retained counsel in unreviewable proceedings before the Veterans Administration?
>
> 3. Does 38 U.S.C. § 3404, as described above, deprive veterans of liberty without due process of law because the $10.00 fee limitation arbitrarily and capriciously prevents a veteran from availing himself of a statutorily granted right to retain counsel?[9]

[8] The court also rejected the equal protection challenge on the ground that veterans' benefits are different from other benefit programs lacking the $10.00 limit.

[9] The jurisdictional petition also presented two additional questions not relevant to the instant case:

> 4. Does 38 U.S.C. § 3404, as described above, deprive veterans of equal protection of the laws as guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States, because applicants for benefits before other agencies of the United States Government are not similarly prevented by fee limitations from retaining counsel to assist them?
>
> 5. Did the District Court improperly refuse to receive evidence offered by appellant at the trial of his action, which evidence would have tended to prove that private veterans' organizations and their lay persons do not provide adequate representation at hearings of the Board of Veterans Appeals to review denials of applications for "service-connected" disability benefits?
>
> (Ex. 101 to Plaintiffs' Opposition to Motion to Dismiss.)

The Supreme Court summarily affirmed the district court's determination. 423 U.S. 802 (1975).

The Supreme Court's summary affirmance, however, is not a holding to the effect that veterans do not have a protected property interest in their benefit claims. While summary dispositions may have binding effect, they have such effect with respect to a particular issue only if that issue was "(1) actually decided in the [court below]; (2) necessary to the ... decision [of the court below]; (3) presented [to the Supreme Court] in the jurisdictional statement; and (4) necessarily decided by the Court in making its summary disposition." *Cherry* v. *Steiner*, 716 F.2d 687, 690 (9th Cir. 1983) (citing *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977)), *cert. denied*, 104 S. Ct. 1719 (1984); *Hicks* v. *Miranda*, 422 U.S. 332 (1975). When the Court summarily affirms it adopts the judgment but not necessarily the reasoning of the court below. In summarily affirming the district court in *Gendron* the Supreme Court may have rejected the district court's determination that no protected right was at stake but have affirmed the district because it found the $10.00 fee limitation did not unconstitutionally burden this protected right. *See Demarest* v. *United States*, 718 F.2d 964, 967 (9th Cir. 1983) (summary affirmance in *Gendron* may have been based on conclusion that Gendron did not have a constitutionally protected property interest, or that while the prop-

erty interest existed the fee limitation did not violate the veteran's right to procedural due process). Thus, the Supreme Court did not necessarily decide the issue of whether veterans have a protected property interest in disability benefits.

Nor does the Ninth Circuit's decision in *Demarest* hold that the veterans lack a constitutionally protected property interest in disability benefits. In that case the court affirmed the district court's granting of summary judgment against a veteran's claim that the $10.00 limit violated his right to procedural due process. Repeatedly noting that the Supreme Court's *Gendron* affirmance may have rested on either of the two grounds, the Ninth Circuit failed to adopt either ground as the basis of its decision. Rather, it simply held that "whichever of the two possible theories the Court in *Gendron* approved, the affirmance in that case compels rejection of the fee limitation challenge here." *Id.* at 967. Therefore, the question of whether applicants for or recipients of SCDD claims have a constitutionally protected property interest in those claims is still open for this court to decide.

b. Do *Gendron* and *Demarest* hold that there is no denial of due process in the VA's application of the $10.00 limit to the veterans in the instant case?

The *Gendron* and *Demarest* decisions, while holding that the $10.00 fee limiation is neither void on its face nor void as applied in the limited factual context presented to the courts in those cases, do not hold that the $10.00 limit is valid as applied to the facts of this case. It is well recognized that "a statute, even if not void on its face, may be challenged because invalid as applied." *Whitney* v. *California*, 274 U.S. 357, 378 (1927) (Brandeis, J. concurring), and that "[a] statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921). *See also Brown*

v. *Socialist Workers '74 Campaign Committee*, ___ U.S. ___, 103 S. Ct. 416, 419 n.6 (1982) (approving district court's analysis that because application of law requiring financial disclosure was invalid as applied, court need not address alleged facial invalidity of the statute); *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 662 n.7 (1982) (mere fact that statute "might have an anticompetitive effect when applied in concrete factual situations" does not render it void on its face).

It is particularly important to conduct a careful inquiry into a statute's application to all the facts of the case at hand where that statute is being challenged as violative of procedural due process. The courts have repeatedly held that the procedural requirements set by the due process clause are flexible and vary according to the particular factual circumstances. *Mathews* v. *Eldridge*, 424 U.S. at 334. *See also Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"); *Hannah* v. *Larche*, 363 U.S. 420, 442 (1960) ("'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts."); Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975) (formality of hearing required by the due process clause may vary greatly according to the circumstances). For example, in *Fusari* v. *Steinberg*, 419 U.S. 379 (1974) the Supreme Court held that its earlier summary affirmance in *Torres* v. *New York State Department of Labor*, 405 U.S. 949 (1972), upholding the district court's rejection of a statutory and procedural due process challenge to New York's "seated interview" procedure for terminating unemployment benefits, did not bar an identical challenge to Connecticut's procedure. The Supreme Court reasoned that *Torres* did not bar a new constitutional challenge because plaintiff alleged that Connecticut had a greater delay in

resolving administrative appeals than did New York, and because the *Torres* court had failed to consider the probable accuracy of the challenged procedures. 419 U.S. at 388 n.15. Similarly, the Supreme Court held that *Torres* did not bar consideration of the statutory issue because "many of the factual distinctions that the District Court relied on to distinguish *Torres* on the constitutional issue apply equally to the 'when due' question." *Id. See Steinberg* v. *Fusari*, 364 F. Supp. 922 (D. Conn. 1973).

In light of the analysis set forth above and having carefully examined the decisions in *Gendron* and *Demarest*, this court determines that those cases do not bar plaintiffs here from claiming that the $10.00 limit has resulted in their being denied the process to which they are due. While the Supreme Court's summary affirmance in *Gendron* clearly bars a facial challenge to the limit, it does not bar a challenge such as that made here. Plaintiffs in the instant case have engaged in extensive discovery to support their allegations that the $10.00 limit has made it extremely difficult for them to prove their claims. They have gathered a great deal of evidence regarding the way the claims process functions and whether it tends to be adversarial, the extent to which VA employees or service organization representatives are able to aid veterans in gathering supporting materials and presenting their claims, the special difficulties posed by such complex claims as those relating to Agent Orange or radiation-related illnesses, the way in which the lack of an attorney renders veterans unable to present their claims adequately, and the financial hardship imposed on veterans by the $10.00 limit. They have also presented statistical evidence regarding the success rates of various types of SCDD claims before the several levels of the VA.

By contrast, the record in *Gendron* was sparse. The case was tried on a meager set of stipulated facts, and the plaintiffs presented no evidence that service organi-

zation representation was inadequate or that the veteran's claim was particularly complex. Plaintiff also made no showing that his inability to obtain representation by an attorney prejudiced his right to a fair hearing. Rather the thrust of Gendron's attack was that the $10.00 fee registration on his ability to retain counsel was a per se violation of his due process rights.

Demarest, like *Gendron*, does not bar all possible challenges to the $10.00 restriction, and does not bar the challenge in the instant case. The *Demarest* court explicitly left open the possibility that a plaintiff in a factually different situation from the plaintiffs in *Demarest* or *Gendron* might mount a successful challenge to the $10.00 limit. In determining that the factual differences *Demarest* attempted to draw between his case and *Gendron* were insufficient to distinguish them,[10] the Ninth Circuit implied that a plaintiff in other factual circumstances might well be able to distinguish the two cases. *Demarest*, 718 F.2d at 967.

This court finds that *Demarest*, like *Gendron*, is distinguishable from the challenge now before the court because the complaint in *Demarest* itself posits the claim in facial terms, stating that "[p]laintiff has a constitutional right to retain counsel at an administrative hearing of this kind, and the statute, on its face, has

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[10] Demarest attempted to distinguish his claim from *Gendron* on grounds which, as the Ninth Circuit pointed out, were irrelevant to his claim. He pointed to the differing length of military service and character of discharge in the two cases, the alleged lateness of Gendron's claim, and the fact that whereas the dispute in *Gendron* apparently turned on service connection, that in *Demarest* concerned the existence of disability. The Ninth Circuit noted that these distinctions were legally irrelevant since the length of military discharge and character of discharge are of no import so long as the claimant has served and been discharged honorably, since no statute of limitation applies to these claims, and since both disability and service connection are necessary to establish a viable claim. 718 F.2d at 967.

prevented him from retaining counsel ...." (Ex. 126 to Plaintiffs' Opposition to Motion to Dismiss at 5.) Moreover, the manner in which Demarest's claim was presented indicates that plaintiff was presenting only a facial challenge to the statute rather than making the full factual presentation necessary to determine whether the *application* of the statute results in a denial of due process rights. *Demarest*, like *Gendron*, was tried on stipulated facts (Transcript of Nov. 25, 1974 hearing, Ex. 123 to Plaintiffs' Opposition to Motion to Dismiss, at 4-5), and counsel did not even make an oral argument before the trial court. 718 F.2d at 968. Nor did plaintiff in *Demarest* build a full record regarding the actual operation of the VA, the extent to which VA hearings are adversarial, the difficulty of presenting claims fully without the aid of counsel in ordinary and particularly in complex cases, and the harm which veterans suffer when they are denied disability claims. Demarest's attorney was not even *permitted* to make the argument that the representative provided by lay service representatives was inadequate to meet the needs of the claimants. (Transcript, Ex. 123 at 5.)

Furthermore, this case involves a category of plaintiffs not considered in *Gendron* and *Demarest*— recipients of benefits whose benefits are subject to termination or reduction. Gendron and Demarest were first-time applicants. In both cases the court observed that, as discussed more fully below, recipients of benefits have a constitutionally protected property interest. Under the reasoning of *Gendron*, adopted by *Demarest*, those plaintiffs who are or represent recipients clearly have a protectable property interest and are entitled to procedural due process.[11]

In sum, this court finds that neither *Gendron* nor *Demarest* nor any of the other cases decided to date

[11] For the reasons explained *infra* this court concludes both categories of plaintiffs in this case, recipients and applicants, are entitled to the same protection.

bar plaintiff's claim in the instant case.[12] Such prior cases do not hold that veterans lack a protected property interest in their benefit claims. These cases also do not bar a plaintiff from claiming, based on a full factual presentation as to the actual operation and effect of the $10.00 limit, that the application of that limit to the plaintiffs in this case has caused them to be denied the process to which they are due under the due process clause. Accordingly, this court now turns to a full analysis of each of these issues.

2. *Do plaintiffs have a protected property interest in their benefit claims?*

Plaintiffs include recipients of and applicants for service-related death and disability benefits and veterans' organizations representing such individuals. The court concludes that recipients and applicants have a protected property interest in their claims to SCDD benefits. It is clear that recipients of welfare, social security or veterans' educational benefits have a statutorily created "property" interest protected by the due process clause of the Fifth Amendment. *See Goldberg* v. *Kelly*, 397 U.S. 254, 261-62 (1970); *Mathews* v. *Eldridge*, 424 U.S. 319, 332 (1976); *Devine* v. *Cleland*, 616 F.2d 1080, 1086 (1980). For the same reasons property interests were found in these cases a veteran's interest in the continued receipt of death and disability payments is a protected property interest. The basic entitlement to such benefits is set forth in 38 U.S.C. §§ 310 and 321, and these sections provide an absolute right to benefits to qualified individuals. *Cf. Doran* v. *Houle*, 721 F.2d 1182 (9th Cir. 1983) (no pro-

[12] *Groza* v. *Veterans Administration*, No. S-82-679 (E.D. Cal. March 15, 1984), does not compel a different result. That decision, of course, is not binding on this court. Moreover, the *Groza* court simply applied the *Demarest* and *Gendron* decisions without engaging in a comprehensive examination of the facts surrounding the case at hand.

tected property interest in permit allowing veterinarians to perform test for brucellosis in cattle, where no statute or regulations set forth standards for issuing or denying such permits), *cert. denied*, ___ U.S. ___, 52 U.S.L.W. 3776 (U.S. April 23, 1984) (No. 83-1358).

Recipients' expectation in the continued receipt of benefits is bolstered by Congress' repeated expression of concern for veterans' welfare.

> Throughout our Nation's history, our people and our Federal Government have shown special concern for meeting the needs of those who are disabled as a result of wartime service in the country's Armed Forces and, more recently, as the result of service in time of either war or peace. Federal assistance to those so disabled has been based upon the national purpose that everything possible should be done to help the disabled veteran readjust to civilian life.

S. Rep. No. 96-746, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 4555, 4564. In light of this concern, recipients may reasonably expect that the death and disability benefit programs will continue to exist.

Applicants for SCDD benefits, as distinct from recipients threatened with total or partial termination, also have a property interest in the receipt of those benefits. While the Supreme Court has never expressly held that applicants for government benefits have such a property interest, the Ninth Circuit and many lower courts have so held. *See, e.g., Ressler* v. *Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for federal rent subsidies have a property interest in obtaining such subsidies); *Griffeth* v. *Detrich*, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied sub nom. Peer* v. *Griffeth*, 445 U.S. 970 (1980) (applicants for general relief have property interest because authorizing statute and implementing regulations create "a legitimate claim of entitlement and expectancy of benefits in persons

who claim to meet the eligibility requirements," 603 F.2d at 121, and benefits are not discretionary); *Kelly* v. *Railroad Retirement Board*, 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity under Railroad Retirement Act has property interest in such annuity); *Wright* v. *Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (applicants initially denied social security benefits, like those facing terminations, are entitled to due process); *Davis* v. *United States*, 415 F. Supp. 1086, 1090-92, 1095-96 (D. Kan. 1976) (applicant for compensation for injuries incurred while engaged in prison employment has property interest in compensation for injuries which may severely restrict or eliminate his earnings capacity); *Shaw* v. *Weinberger*, 395 F. Supp. 268, 270-71 (W.D.N.C. 1975) (Supplemental Security Income applicant has property interest); *Barnett* v. *Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (welfare applicant has property interest). *See also Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) (applicant for admission to practice law entitled to due process).

These courts reasoned that applicants, just like recipients threatened with termination for alleged ineligibility, have a property interest because of their statutory entitlement to benefits if they meet the substantive requirements. For example, the court in *Davis* v. *United States*, 415 F. Supp. 1086 (D. Kan. 1976), provided a careful analysis of the property interest of an applicant for compensation benefits for injuries allegedly suffered while employed in a federal prison hospital:

> [T]he applicant's interest consists of a claim authorized by statute and regulations to secure compensation for alleged employment disabilities of prison origin that may severely restrict, and sometimes eradicate, his earning potential upon release into society. Although at the application stage of the proceedings neither plaintiff nor a claimant in his position has yet been administratively adjudged

entitled to receive benefits under the regulatory scheme, an applicant nonetheless possesses a property interest of sufficient magnitude to invoke the protection of the Fifth Amendment's due process clause. Like the welfare plaintiffs in *Goldberg* v. *Kelly*, ..., inmates have been granted an entitlement to compensation benefits under 18 U.S.C. § 4126 and its attendant regulations if they factually satisfy the criteria set forth by the regulations. By their establishment of an objective medical standard for qualification, the regulations create a legitimate expectancy that an individual application will not be denied unless the Bureau factually determines either that the claimant does not suffer from a disability originating from his prison employment, or from one that would affect his work capacity after release .... This property interest is one of substantial importance to the plaintiff, as its arbitrary denial could leave him with an uncompensated disability of lifelong duration and condemn him to "suffer grievous loss."

Id. at 1090-91. The analysis of these cases establishing a property interest in applicants for benefits applies equally in this case. Moreover, as discussed *supra*, applicants for SCDD benefits, like recipients, have reason to believe that Congress will continue to ensure that persons who have been disabled in the course of serving their country's military will receive adequate compensation. Plaintiffs have a high probability of success on their claim to a property interest in the SCDD benefits.

This interpretation is consistent with the Supreme Court's analysis of *Goldberg* in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972):

> The welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

As the *Davis* court observed:

> This statement demonstrates that the focal point of *Goldberg* was not upon the fact that benefits have previously been received, but upon the existence of statutory provisions creating the right to welfare and defining the terms under which it could be obtained.

Davis v. *United States*, 415 F. Supp. at 1092. It is true that a property interest in a benefit must be grounded in "a legitimate claim of entitlement" which is "more than an abstract need or desire for it" or "a unilateral expectation of it." *Roth*, 408 U.S. at 477. However, the plaintiffs here have the requisite legitimate claim of entitlement by virtue of the statutory entitlement to veterans benefits and the requisite performance of military service by them or those that survive. If they meet the requirements for service-connected death and disability payments they are entitled to benefits.

3. *Does the $10.00 fee restriction deny plaintiffs the process to which they are due?*

In determining what process is due the court must employ a flexible balancing test that takes into account all the particular facts and circumstances, as the need for procedural safeguards varies with the situation:

> "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972) .... [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the

procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Goldberg* v. *Kelly, supra*, 397 U.S. at 263-71.

Mathews, 424 U.S. at 334-45 (citations to unofficial reporters omitted).

a. The private interest that will be affected by the official action

The veterans' interest in obtaining service-connected death and disability benefits is extremely high. Their need for such benefits is great and compensation through the VA claims procedure is the veterans' sole remedy against the government. They cannot sue for disabilities stemming from their military service under the Federal Tort Claims Act. *Feres* v. *United States*, 340 U.S. 135 (1950).

Many of the claimants and recipients are totally or primarily dependent upon service-connected death and disability benefits for their support. *E.g.*, Maxwell Dep. at 78-80; Warehime Decl. ¶ 10; Stavick Aff. at 30. Most of the claimants have some disability, even if the VA ultimately determines they are not entitled to benefits (Hawke Dep. at 155-56; Verrill Dep. at 225-26), and many claimants' disabilities prevent them from working at all. *E.g.*, Huskey Aff. at 2, ¶ 4; Warehime Decl. ¶ 10; Maxwell Dep. at 35; Autrey Decl. ¶ 7; Souness Decl. ¶ 13. As a result, a substantial number of the plaintiffs are poor or destitute. *See* Warehime Decl. ¶ 10; Autrey Decl. ¶ 7; Burke Decl. ¶ 14; Dempsey Decl. ¶ 8; McBee Decl. ¶ 14; Souness Decl. ¶ 13. [W]e have lots of people that ... can't even afford a car or they can't even have a driver's license any more." (Woodall Dep. at 267).

Certainly plaintiffs have shown their interest in obtaining benefits to be as great or greater than that of the veterans receiving educational benefits or applicants for subsidized housing who have been held entitled to substantial procedural protections by the Ninth Circuit. *See Ressler* v. *Pierce*, 692 F.2d 1212 (9th Cir. 1982); *Devine* v. *Cleland*, 616 F.2d 1080 (9th Cir. 1980).[13] *Cf. Goldberg* v. *Kelly*, 397 U.S. 254, 261 & 264 (1970) (inappropriate to cut off benefits of welfare recipients in face of 'brutal need,' particularly since such individuals, lacking independent resources, will have to concentrate efforts on finding means for daily subsistence rather than on seeking redress from the bureaucracy).

The court must weigh not only the direct financial impact of the VA's denial of an eligible veteran's claim, but also certain less direct interests. The poverty and despair a veteran and his family may suffer from an uncompensated disability could frustrate that veteran's reintegration into civilian society. In addition, as the Ninth Circuit found in *Devine*, the court "cannot ignore an important concern: the psychological value to the veteran of personally communicating with bureaucracy before it profoundly alters his entitled status." 616 F.2d at 1088.

The fact that some of the plaintiffs are applicants for new or additional benefits and do not face termination of existing benefits may somewhat reduce the weight of their interest but certainly does not eliminate it. *See Ressler* v. *Pierce*, 692 F.2d at 1217. Veterans killed or

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[13] Curiously, the court in *Demarest* made no attempt to reconcile its decision with its earlier holding in *Devine* which recognized a property interest in veterans' continued receipt of educational benefits. Only a formalistic recipient-applicant distinction justifies this result, for surely there is a more compelling interest in death and disability benefits than in the continued receipt of educational benefits.

injured in military service generally lose all or much of their ability to earn a livelihood. "[A]rbitrary denial [of benefits] could leave him with an uncompensated disability of lifelong duration and condemn him to 'suffer grievous loss.'" *Davis* v. *United States*, 415 F. Supp. at 1091.

b. The risk of erroneous deprivation

In one sense the VA itself has recognized the important role played by attorneys in helping claimants apply for SCDD benefits by according claimants the right to representation by an attorney at all stages of an appeal. 38 C.F.R. § 19.150 (1983). However, as the VA has admitted in another context, the $10.00 fee limitation essentially eliminates veterans' right to obtain private counsel of their own choosing to represent them in bringing service-connected death and disability claims before the VA.[14] The limit, enforced by the VA with informational letters, and the threat of criminal prosecution (Verrill Dep. at 103-05), causes many attorneys to decline to represent veterans. *E.g.*, Bakal Aff. ¶ 1; Johnson Decl. ¶ 6; Caron Decl. ¶ 5; and Fox Decl. ¶ 6. Moreover, the strict fee limitation cannot but drastically limit the amount of time any attorney who takes a SCDD claim can afford to spend on the case, compared to the time she might have spent were she able to obtain more than a $10.00 fee.

To determine whether the $10.00 fee limitation, by eliminating the veterans' right to obtain counsel of their own choosing, creates a substantial risk of erroneous

[14] July 14, 1981 Letter from VA to Hon. Alan K. Simpson, Chairman of the Senate Committee on Veterans' Affairs. (Ex. 114 at 43, 54). The letter states:

> It is probably true that, except for those whose low income qualifies them for free legal services, the current fee limitation effectively precludes attorney representation before the VA.

deprivation, the court must consider both the role generally played by attorneys and the valuable services they may perform, and the particular characteristics of the process for obtaining benefits at the VA. The court must then determine whether, given the procedures employed by the VA, the fee limitation results in a denial of due process.

i. *General importance of attorneys*

As the Supreme Court has held, "[t]he right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Goldberg* v. *Kelly*, 397 U.S. 254, 270 (1970), *quoting Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Goldberg*, 397 U.S. at 270. The Court's recognition of the important functions served by attorneys led it, in *Goldberg* v. *Kelly*, to require that all welfare recipients be permitted to retain counsel to assist them in a hearing before the agency prior to having their benefits terminated. *Id.*

Courts' awareness of the important services lawyers may provide has led them to require that persons be able to retain attorneys or even have one appointed for them[15] in a variety of other civil contexts as well.[16]

[15] Some have argued that the role played by civil counsel is so important that civil defendants, and even, in certain circumstances, plaintiffs, have the right to be *provided* with counsel. *E.g.*, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967); *The Right to Counsel in Civil Litigation*, 66 Colum. L. Rev. 1322 (1966).

[16] While the right to appointed counsel in criminal cases rests, of course, on Sixth Amendment grounds, the Court's reasoning regarding the lay person's need for an attorney's assistance applies equally to civil cases. *See Gideon* v. *Wainwright*, 372 U.S. 335 (1963).

Ressler v. *Pierce*, 692 F.2d 1212, 1219-22 (9th Cir. 1982) holds that applicants for Section 8 subsidized housing, initially found ineligible, may have an attorney prepare a written response or appear at the HUD office to contest this determination. In *Elliott* v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977), *rev'd in part on other grounds sub nom. Califano* v. *Yamasaki*, 442 U.S. 682 (1979), the Ninth Circuit noted that "[t]he objective [of due process] is to ensure that the agency will acquire the information it should have in a manner fairly calculated to illuminate the issue for reasoned decision making." *Id.* at 1233, *quoting City of Santa Clara, California* v. *Kleppe*, 418 F. Supp. 1243, 1260 (N.D. Cal. 1976)). The court held that old age and disability insurance recipients threatened with recoupment by the government have a right to a pre-termination hearing and representation by counsel in order to assert their waiver arguments. 564 F.2d at 1235. The Supreme Court affirmed this aspect of the court's judgment reasoning that because the waiver determination rests on findings of fault and credibility, a pretermination hearing is required. 442 U.S. at 690-97. The Ninth Circuit has also held that persons have a right to retain counsel to represent them in hearings before the Securities and Exchange Commission, *Sartain* v. *Securities and Exchange Commission*, 601 F.2d 1366, 1375 (9th Cir. 1979), and in proceedings prior to expulsion from school. *Black Coalition* v. *Portland School Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973). In *Cleaver* v. *Wilcox*, 499 F.2d 940 (9th Cir. 1974), a case involving parents' right to retain custody over their children, the Ninth Circuit found the right at stake so important and the role of an attorney so key that it required *appointment* of counsel. *Id.* at 945. The court reasoned that "[d]espite the informality of the juvenile dependency hearings, the parent, untutored in the law, may well have difficulty presenting his or her version of disputed

facts, cross-examining witnesses, or working with documentary evidence." *Id.*

The Ninth Circuit's determination of whether counsel must be permitted rests generally on the importance of the interest at stake, the nature and complexity of the issues to be presented and the likely ability of the persons involved to be able to present such issues. Thus, in *Toney* v. *Reagan*, 467 F.2d 953 (9th Cir. 1972), the court held that non-tenured professors denied reappointment are not entitled to counsel, noting that welfare recipients dealing with the state are far more likely to need counsel than are professors dealing with their peers, absent a showing of special circumstances requiring representation by counsel. *Id.* at 958.

Other Circuits, too, have required that persons be allowed to retain counsel in a variety of agency hearings. *E.g.*, *Ahern* v. *Board of Education*, 456 F.2d 399, 403 n.2 (8th Cir. 1972) (public school teacher threatened with discharge); *Caulder* v. *Durham Housing Authority*, 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) (person threatened with termination of lease in federally assisted public housing project). In reviewing denials of social security disability claims, similar in some ways to the determinations at issue in the instant case, courts have emphasized the importance of representation by counsel by considering the lack of counsel as one reason for remanding or even reversing the Secretary's decision. Where, despite the claimant's right to retain counsel and to pay counsel up to 25% of the benefits they ultimately receive, claimants have failed to enlist the aid of an attorney, courts hold the ALJ to a particularly high standard of developing a full and fair record. If the administrative law judge ("ALJ"), always theoretically conducting hearings in a non-adversarial fashion, does not meet this standard by making a scrupulous inquiry into all the relevant facts, the determination may be reversed or remanded. *E.g.*,

Deblois v. *Secretary of HHS*, 686 F.2d 76, 80-81 (1st Cir. 1982); *Echevarria* v. *Secretary of HHS*, 685 F.2d 751, 755 (2d Cir. 1982); *Smith* v. *Secretary of HEW*, 587 F.2d 857 (7th Cir. 1978); *Webb* v. *Finch*, 431 F.2d 1179 (6th Cir. 1970).

It is crucial to note that by contrast to the participants in many agency hearings who will have later opportunities to engage counsel to assist them in their claims either in a post-termination hearing or in a subsequent judicial proceeding, the $10.00 fee limitation restricts veterans' ability ever to retain counsel to assist them in bringing service-connected death and disability claims against the VA. No subsequent judicial review of the VA determination is even available, 38 U.S.C. § 211(a), and the $10.00 fee limitation applies in any case to both pre- and post-termination proceedings. *Cf. Mathews* v. *Eldridge*, 424 U.S. 319, 339 & 349 (1976) (denying social security disability recipients right to pre-termination hearing with counsel, but noting that recipient had right to full evidentiary post-termination review with assistance of counsel both at the agency level and, ultimately, in court).

ii. *Importance of attorneys in this case*

To determine the importance of representation by counsel to SCDD claimants the court must examine the procedural context in which such claims are brought, and the roles played by both VA personnel and service organization representatives, as well as the role which might be played by attorneys. Unfortunately, it is not possible to make this determination simply through a statistical comparison of the relative success of attorneys and other representatives, although the parties have submitted statistics comparing the relative success of those few attorneys who represent SCDD claimants before the VA notwithstanding the $10.00 fee limit with that of other representatives. Both sides argue that the evidence supports their position. While plaintiffs argue that "claimants represented by attorneys/agents appear to be more successful than claimants represented by non-attorneys at the BVA level," (Plaintiff's Opposition to Motion to Dismiss at 40-41), the government argues that the same statistics show that the percentage of allowances for persons represented by attorneys/agents "was virtually identical to those represented by service organizations. (Defendant's Brief at 5).

The court finds that the statistics are not helpful to the determination of whether the $10.00 limit impedes claimants from obtaining adequate representation. The success rate of those few attorneys who are now taking SCDD cases on essentially a pro bono basis is a completely inadequate predictor of the success rate of paid attorneys. Not only may paid attorneys be able to devote more time and resources to the cases (*see* Woodall Dep. at 263), but they may also develop substantial expertise in the complicated legal areas involved with SCDD claims. Currently, the few attorneys who take SCDD cases generally do so on a one-time basis. (Woodall Dep. at 260-62). Thus, it is not surprising that attorneys who take SCDD claims notwithstanding the $10.00 limit appear to do little better than the service organization representatives. (*See* BVA statistics, Ex. 104; Defendant's supplemental authorities). By contrast, paid attorneys who represent veterans in discharge upgrade proceedings, which are not governed by a fee limitation, had a success rate of 72.73% compared to service organization representatives' success rate of 48.28%. (Legal Services Commission Report to Congress on Access of Veterans to Legal Assistance, Ch. 2 ("LSC Report"), Ex. 70 at 123). Accordingly, the court must look beyond such statistical evidence to determine the claimants' need for representation, and how well this need is being met under the current system.

Claimants for service-connected death or disability benefits must "submit evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." 38 C.F.R. § 3.102 (1983). They must demonstrate not only that the disability exists or that the death has occurred, but also that this disability or death was "service-related." 38 U.S.C. § 301 *et seq.*

Claims are initially presented to one of the approximately 58 VA regional offices where a rating panel, made up of a medical specialist, a legal specialist, and an occupational specialist, makes an initial determination, (rating), as to whether the claim should be granted or denied. (LSC Report, Ex. 70 at 69-70). These ratings are based on a complicated schedule containing detailed anatomical and other discussion on a variety of medical problems. 38 C.F.R. § 4.1 *et seq.* (1983).

Once the rating board has made its determination it provides the claimant with a Notification of Decision (ND). 38 C.F.R. § 3.103(e) (1983). The most common ND is a very brief computer notice stating something to the effect that "[y]our claim for death benefits is disallowed. The evidence does not establish that the veteran's death was due to a service-connected disability." (Verrill Dep. at 144).

To challenge an adverse regional office decision the claimant must file a "Notice of Disagreement" ("NOD") within one year from the mailing of the ND. If no NOD is filed the decision is deemed final. 38 C.F.R. § 19.129 (1983).

Upon receipt of the NOD the VA may either reverse its decision or take any necessary preliminary action and proceed to prepare a "Statement of the Case" ("SOC"), in which the VA frames the issue for appeal. The SOC should include a summary of the evidence, a citation to pertinent laws and regulations, the decision

reached by the rating board, and the reasons for that decision. 38 C.F.R. § 19.120 (1983).

Once the claimant receives the SOC he must perfect his appeal by filing a "Substantive Appeal" within 60 days from the date of the mailing of the SOC, or within the remainder of the one-year period from the date of mailing of the ND. 38 C.F.R. § 19.129(b) (1983). The appellant is "presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken," 38 C.F.R. § 19.121(b)(3) (1983), and so the substantive appeal must set out specific allegations of error of fact or law. 38 C.F.R. § 19.123(a) (1983).

Upon filing of a Substantive Appeal the claim is transferred to the Board of Veteran Appeals ("BVA") in Washington, D.C. The BVA consists of sixteen three-member panels, the members of which are Presidential appointees. *See* LSC Report, Ex. 70 at 71; 38 U.S.C. § 4001; 38 C.F.R. § 19.110 (1983). The BVA is to base its decision for affirmance, reversal, or remand of the rating board's determination "on the evidence and argument of record, and will not be limited to that cited in the statement of the case." 38 C.F.R. § 19.121(b)(5) (1983). The Board's decision should be based on a review of the entire record. 38 C.F.R. § 19.180 (1983). The regulations set forth no formal requirement of deference to the determination of the rating panel.

BVA determinations are final, except that reconsideration by the BVA is available upon allegation of errors of fact or law or upon discovery of new evidence. 38 C.F.R. § §19.104 (1983); 19.85 (1983). Judicial review is precluded by statute. 38 U.S.C. § 211(a).

At all stages of a claimant's dealings with the VA the claimant is permitted by regulation to introduce documentary, testimonial, or other evidence in support of his claim, as well as to raise any arguments he seeks included in the record. 38 C.F.R. §§ 3.103(b), 19.172

(1983). Theoretically, "[u]pon request a claimant is entitled to a hearing at any time on any issue involved in a claim" in which he may present such evidence. 38 C.F.R. § 3.103(c) (1983). The regulations also provide that claimants have a right to a "nonadversary" hearing before the BVA so that they may present argument or testimony. 38 C.F.R. § 19.157 (1983). The claimant may arrange for the voluntary appearance of witnesses, but the BVA will not require the appearance of any witness, including VA personnel. 38 C.F.R. § 19.165 (1983). Cross-examination is not permitted at these hearings. 38 C.F.R. § 19.157 (1983).

The undisputed factual evidence submitted by the plaintiffs in this case shows that both the procedures and the substance entailed in presenting SCDD claims to the VA are extremely complex. Procedurally claimants are faced with an interplay between the following: statutes; regulations published in the Code of Federal Regulations; the Procedural Manual M-21-1 (Ex. 17); the BVA Manual (Ex. 45); the Program Guide (Ex. 19); the Filed Appellate Procedures Manual M1-1 (Ex. 150); adjudication memoranda; VA circulars; informal memoranda; and BVA decisions. The interrelationship between these various rules is so complex that one VA adjudication officer, Thomas Verrill, developed his own personal cross-index on file cards in an attempt to master the complexity. (Verrill Dep. at 220-21). The VA's Northern California office is even attempting to develop a computerized cross-index for the various VA directives, regulations, and statutory provisions. *Id.* at 221.

Veterans' failure to comply with the VA's procedural regulations may result in denial of their claims. Where, for example, a person is advised by the VA to produce certain evidence and fails to respond to the letter within a year, the VA may make a "record purpose dis-

allowance," denying the claim. (38 C.F.R. § 3.109 (1983); Verrill Dep. 303-04; Woodall Dep. 63-69). As this denial is made without further notice to the claimant, the claimant has no opportunity to appeal. (Verrill Dep. 307). Moreover, the record purpose disallowance results in a forfeiture of accrued or retroactive benefits if the claim is ultimately reopened. (Verrill Dep. 306). Such record purpose disallowances make up a substantial number of the claims which are ultimately denied by the VA. (Woodall Dep. 236; VA statistics, Ex. 99 at 6-14). Similarly, veterans may be severely prejudiced by their failure to comprehend and thus meet the burdens of proof and time limits incorporated in the various regulations and informal circulars. *E.g.*, Woodall Dep. 140-43 (discussing VA interpretation of reasonable doubt standard); Verrill Dep. 462-63 (consequences of failure to file a timely substantive appeal). Moreover, the VA's failure to furnish an applicant with notice of a time limit does not extend the period of time allowed for the action involved. 38 C.F.R. § 3.109(b) (1983).

Claims for service-connected death and disability benefits often turn on very complicated substantive analyses as well. The determination of the degree of disability frequently rests on a difficult medical analysis, and proof of service connection may raise causation issues which require both medically and legally complex analyses. In addition, difficult questions may arise as to whether a veteran's death or disability resulted from his "willful misconduct," 38 U.S.C. § § 310 and 410, or as to whether "clear and unmistakable error" warrants termination of service-connection. (Woodall Dep. 169-71).

Often, to make a convincing claim, veterans or their families have to gather and present vast amounts of factual information regarding both the medical nature of the veteran's illness and also the circumstances which might have given rise to that illness. (*See* LSC Report,

Ex. 70 at 7; Schroeter Aff. ¶ 5). This is particularly so with respect to those claimants seeking to obtain benefits for deaths or disabilities arising from such causes as exposure to atomic radiation or Agent Orange, or from Post Traumatic Stress Syndrome ("PTSS"). Such claims may often involve "more legal and procedural complexities than do many judicially litigated matters ...." (Johnson Decl. ¶ 4). *See also* Woodall Dep. 114. Adequate preparation of such claims may often require hundreds of hours of work (Bakal Aff. ¶ 1; Stavick Aff. 2-13), and will in many cases necessitate obtaining expert testimony. *E.g.* Woodall Dep. 75, 143; Verrill Dep. 536-37.

The VA regulations contemplate two mechanisms to aid claimants in wading through the procedural and substantive complexities of the SCDD claims process: assistance from VA personnel; and representation by a recognized service organization, attorney, agent, or other authorized person. The regulations expressly state that "[i]t is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (1983). Thus the regulations direct "the Veterans Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position." 38 C.F.R. § 3.103(c) (1982). *See also* 38 C.F.R. § 19.157(c) (1983) (describing hearing before the BVA as nonadversary).

The regulations also establish a system whereby certain officially recognized service organizations may represent veterans in bringing their claims before the VA. The purpose of this system is "to assure that claimants for Veterans' Administration benefits have qualified

representation in the preparation, presentation, and prosecution of claims for veterans' benefits." 38 C.F.R. § 14.626 (1983). Service organizations receive no fee for their services, 38 C.F.R. § 14.634(a) (1983), and the representatives they provide need not be attorneys. 38 C.F.R. § § 14.626-14.629 (1983). A claimant who is being represented by a service representation may not also be represented by an attorney. 38 C.F.R. § 14.631(c) (1983).

The evidence submitted by the plaintiffs shows that contrary to the claims of the defendants, neither the VA officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to claimants. Even assuming that all VA personnel were prepared to do everything that they could to build claimants' cases for them,[17] it is clear that the resources of the VA are insufficient to permit the substantial investment of time that would be necessary. Claims examiners are allocated a mere 2.84 hours in which to develop the facts underlying an initial SCDD claim (Woodall Dep. 48-52; Verrill Dep. 57-59), and their performance is measured in part by the speed with which they process claims. (Woodall Dep. 53). Regional offices, similarly, receive higher ratings if they are able to move claims along quickly. (Woodall Dep. 245-46).

The VA's inability to devote substantial resources to each claim evidences itself in the factual development

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[17] The dual dictate of 38 C.F.R. § 3.103(a) (1983), which requires VA personnel to provide claimants with "every benefit that can be supported in law while protecting the interests of the Government," also raises a question as to the extent to which it is possible to serve the interests of both the VA and claimants simultaneously. Clearly the financial interests of these two parties may often conflict, and it is not inconceivable that VA personnel might feel some pressure to protect the government purse.

which is done on the cases. The VA rarely does anything beyond accumulating the medical and service records of the veteran involved. (Verrill Dep. at 41). Thus the VA does not generally seek out testimony which might confirm a veteran's claim that his disability was service-related, does not request experts' reports regarding possible sources of a death or disability, does not order further medical investigation by independent doctors, and does not carry out its own investigations to determine whether a group of veterans might have been exposed to harmful conditions in the course of their service with the military. Not once has the Northern California Regional office requested an expert medical opinion to aid it in determining whether a veteran's death or disability was caused by service-related atomic radiation. (Verrill Dep. at 36, 231). As Max Woodall, director of Compensation and Pension Service for the Department of Veterans Benefits for the VA explained, the claimant often bears the initial burden of tracking down potential witnesses:

> Well, its up to the claimant first, yes. I would say the primary responsibility is for the claimant to try to develop the information and the documentation to establish this claim. And then we are secondarily responsible in certain areas.

(Woodall Dep. at 156-57).

Even where the relevant information sought lies particularly within the control of the VA, it does not make the necessary effort to obtain that information. Thus, the VA does not document patterns of exposure or disease either by requesting information from other regional offices or by comparing the files of claimants within a single office, even though such cross-referencing might substantially aid veterans seeking to establish complex atomic radiation or Agent Orange claims. (Verrill Dep. at 23; Woodall Dep. at 166-68).

Similarly, the VA rarely exercises the statutory authority provided by 38 U.S.C. § 3311 to subpoena documents to support an applicant's claim. (Woodall Dep. 279). In fact, since 1979 the VA has issued only five subpoenas pursuant to this statute in connection with claims for service-connected benefits (VA Int. Ans. 25), and some of these may have been issued in an attempt to disprove rather than help support a claim. Adjudication Officer Thomas Verrill recalled just two instances in which such a subpoena had been used to obtain documents, and in both instances the VA sought the documents because it suspected that the claimant was misleading the VA. (Verrill Dep. at 61-62).

The VA, moreover, undercuts one of the important procedural rights entailed in its own regulations. It discourages applicants from exercising their right to request a hearing at any time until after the initial determination has been made in their case, even though this denial precludes claimants from having direct input into the most critical stage of the adjudication of their claim. (Woodall Dep. 16). The VA's own statistics covering a three-year period show that hearings may be crucial to a veteran's chance of success in this claim. They indicate that where a personal hearing was held before the BVA the claim was almost twice as likely to succeed. (VA Supp. Int. Ans. 17(a) & 17(b), Ex. 126 at 4). Nevertheless, in the interests of practicality and conserving limited government resources it appears that the VA often encourages applicants to waive their right to a pre-determination hearing. (Verrill Dep. 272-87; Ex. 17 at 139). By contrast, a claimant's paid attorney might well advise that claimant not to waive such a right.

Not surprisingly, given the VA's apparent inability to protect a claimant's interests as fully as might that claimant's personal paid attorney, both claimants and attorneys familiar with the VA system view that system as adversarial, despite the contrary description of

the 38 C.F.R. § 19.157(c) (1983). *E.g.*, Johnson Decl. ¶ 7 (attorney); Miles Decl. ¶ 6 (attorney); Dorfmeier Decl. ¶ 11 (claimant); Cordray Decl. ¶ 13 (claimant).

The evidence shows that the veterans' service organizations which represent SCDD claimants in approximately 85% of the appeals taken before the VA,[18] (BVA statistics, Ex. 75) like the VA itself, are severely overburdened and thus unable to perform all the services which might be performed by a claimant's own paid attorney. As Dean Phillips, attorney advisor to the BVA noted, "veterans organizations ... deal with an excruciatingly large number of [cases]." (Phillips Dep. 33). *See also* LSC Report, Ex. 70 at 49 (discussing "crushing" caseload facing service organizations).

Given this heavy caseload, and given the fact that "almost none" of the service representatives are attorneys (Standefer Dep. at 164-65),[19] it is not surprising that the representation they provide is often scant compared to that which might be provided by a private attorney. Service representatives rarely gather or develop either expert testimony or documentary evidence on their own to support the applicant's claim. (Standefer Dep. 170). *See also id.* at 188 (experts rarely used); Miles Decl. ¶ 5 (most service organizations lack resources to do extensive factual development); Turcotte Decl. ¶ 5 (same). Thus, "in almost all cases the record will consist of the claimant's service history and his service medical history." (Standefer Dep. 171).

The written memos produced by service representatives also suffer. Even in presenting a claimant's final appeal to the BVA, it is standard practice for service

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[18] The service organizations may represent claimants at the regional office level as well. It is not clear how many veterans obtain such representation as no such statistics are kept by the California regional office.

[19] Indeed, the service representatives need not even have a college degree. (Fong Decl. ¶ 5).

organization representatives to submit merely a one to two page handwritten brief. (Standefer Dep. 182-84). This brief rarely cites to authority, and in fact is frequently written by the claimant himself rather than by the representative. *Id.* at 182.

Nor does the representative make up for these written inadequacies through oral advocacy. The vast majority of BVA hearings are handled merely through the submission of an "informal hearing memorandum," and in these cases the claimant never meets with his representative. (Standefer Dep. 168-69). When claimants do appear before the BVA in a hearing, the first time they meet with the service representative who will be assisting them is usually just thirty minutes before the hearing. (Verrill Dep. 225; Standefer Dep. 166). At hearings before the local rating panel service organization representatives commonly rely upon the board members to ask all the questions, rather than asking the questions themselves. (Verrill Dep. 510-511).

It should be noted that the limited nature of the services provided by the service organization representatives, as compared to the services which might be provided by a paid private attorney, does not reflect any lack of dedication on the part of those organizations. The government has submitted numerous declarations of the heads of such veterans' service organizations as the National Veterans Service of the Veterans of Foreign Wars of the United States, the American Red Cross, the Disabled American Veterans, the American Veterans of World War II, Korea and Vietnam, and the Paralyzed Veterans of America. According to these declarations the organizations work very hard on behalf of their members and the other veterans they represent. Plaintiffs do not deny that such organizations provide substantial service, but argue simply that due to these organizations' limited resources, they are unable to provide the full array of services which a paid attor-

ney might provide. Thus, the court concludes plaintiffs have demonstrated a high probability of success on their argument that the $10.00 fee limitation creates a high risk of erroneous deprivation. Given the very limited extent to which either the VA personnel or service organization representatives are able to assist veterans or their families in bringing service-related death and disability claims, the vast substantive and procedural complexities facing such claimants, and the important need of such claimants, the $10.00 fee limitation deprives plaintiffs of the ability to make a full presentation of their claim to the VA. Absent the fee restriction claimants would be able to hire attorneys to assist them in gathering medical and other documentary evidence, finding witnesses who could confirm the claimants' version of events which transpired, obtaining expert testimony and reports, and presenting their evidence in a convincing fashion both on paper and in oral argument. Attorney representation is also more likely to ensure that veteran claimants comply with procedural rules and have their claims decided on the merits.

The complexity of the substance and procedures involved in these proceedings, as well as the importance of the interest at stake, certainly give rise to a need for representation which is as great or greater than the need of the welfare recipients in *Goldberg* v. *Kelly*, the broker dealer in *Sartain*, the applicant for subsidized housing in *Ressler*, or the recipients of old-age and disability insurance in *Elliott* v. *Weinberger*. It is highly unlikely that veterans or their families will, without the use of an attorney, prove able to build and present their cases as ably as an attorney. In sum, in none of these cases was it clearer that, "[t]he right to be heard would be in many cases of little avail if it did not comprehend the right to be heard by counsel." *Goldberg*, 397 U.S. at 270, *quoting Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932).

c. The Government's interest

Looking finally to the third factor the court should consider in determining whether a restriction denies persons their rights to procedural due process, it is clear that the government has asserted little or no cognizable interest in maintaining the $10.00 fee restriction. As discussed *infra* in connection with the government's showing of hardship which might bar issuance of a preliminary injunction, the government has failed to demonstrate that it would suffer any harm if the statutory fee limitation, in existence in some form since 1862,[20] were lifted. The government has neither argued nor shown that lifting the fee limit would harm the government in any way, except as the paternalistic protector of claimants' supposed best interests. To the extent the paternalistic role is valid, there are less drastic

[20] In an Act passed on July 15, 1862, Congress provided that payments to attorneys assisting in the procurement of pension or bounty claims would be limited to $5.00, with additional small payments available under special circumstances. 12 Stat. 566 (1862). A subsequent series of statutes was passed amending this provision, and enacting similar provisions with respect to various groups. *E.g.*, 43 Stat. 607, 628 (1924); 49 Stat. 2031 (1936). Interestingly, the rationale of these original statutes no longer even appears to apply. Not only can $10.00 buy a lot less now than it used to, but the list of tasks covered by the $10.00 limit has also become broader. Originally, the fee limitations applied to the essentially clerical task of preparing claims forms, 13 Stat. 387 (1864), and later statutes expressly permitted percentage fees ranging from five to ten percent for litigated cases requiring more than just clerical work. 38 Stat. 711 (1914), 40 Stat. 102 (1917). It is thus ironic that whereas Congress' evident purpose in initially enacting the flat fee limitation was "to protect veterans from extortionate fees for mere clerical assistance," *Smith* v. *United States*, 83 F.2d 631, 640 (8th Cir. 1936), the fee limitation is now preventing veterans from obtaining adequate assistance in very complex cases.

means available to ensure that attorneys' fees do not deplete veterans' death or disability benefits.

d. Conclusion

Having weighed the parties' showings on each of the three factors set forth in *Mathews* v. *Eldridge*, this court determines that plaintiffs have demonstrated a high likelihood of prevailing on their procedural due process claim.

B. Plaintiffs' claim that the $10.00 fee limitation violates their First Amendment rights

As a separate cause of action plaintiffs allege that the $10.00 fee restriction deprives them of their First Amendment rights to petition the government for redress of grievances, and to speak and associate freely. The individual plaintiffs argue that the $10.00 restriction bars them from hiring lawyers to assist them in bringing service-related death and disability claims before the VA, thereby depriving them of their rights to petition and to meaningful access to the VA in that without the opportunity to retain counsel they cannot adequately assert their claims. The individual plaintiffs also argue that the fee restriction deprives them of their right to associate freely with retained counsel. The organizational plaintiffs' argument is slightly different. They contend that the $10.00 limit bars them from providing adequate legal services to their members. Although no law directly precludes NARS and Swords to Plowshares from representing SCDD claimants and even hiring lawyers to represent those claimants, the fee restriction allegedly indirectly cripples their ability to do so. Because the organizations are precluded from obtaining payment from successful claimants, their ability to continue operations and thereby provide legal assistance to more claimants is severely impeded.

Even were plaintiffs' due process argument barred by the decisions in *Gendron* or *Demarest* it is clear that

these cases, which did not consider a First Amendment argument, would not bar the First Amendment portion of plaintiffs' claim. In fact, the one appellate court which considered such a First Amendment argument in the context of the SCDD claims process refused to dismiss the First Amendment claim, finding it sufficiently meritorious that it should be remanded to the district court for further consideration of the nature of the VA system and the availability and adequacy of free counsel. *Staub* v. *Johnson*, 519 F.2d 298, 302 (D.C. Cir. 1975).[21] Moreover, by contrast to the procedural due process claim, no property or liberty interest need be established as a prerequisite to asserting a First Amendment claim. *Cf. Hilliard* v. *Scully*, 537 F. Supp. 1084, 1090 (S.D.N.Y. 1982) (even though prisoner had no liberty interest in being confined in any particular prison, his right to petition the courts could not be violated by transfer designed to obstruct his access to the courts).

If plaintiffs are successful in arguing that the fee restriction violates their First Amendment rights, the restriction can survive only if it serves substantial government interests, and is drawn narrowly to serve those interests. *United Mine Workers* v. *Illinois Bar Assn.*, 389 U.S. 217, 222-23 (1967); *Brotherhood of Railway Trainmen* v. *Virginia State Bar*, 377 U.S. 1, 7-8 (1964).

Plaintiffs have shown that their First Amendment argument has a high probability of success. While the Supreme Court has never directly addressed the question presented here, its cases establish the principle that the

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[21] On remand the district court again dismissed both the due process and First Amendment claims, *Staub* v. *Johnson*, 424 F. Supp. 1346 (D.D.C. 1976), but the Circuit Court for the District of Columbia vacated and remanded this decision without publishing its reasons for the action. *Staub* v. *Johnson*, 574 F.2d 637 (D.C. Cir. 1978).

First Amendment rights to petition, association and speech protect efforts by organizations and individuals to obtain effective legal representation of their constituents or themselves. In particular, it has held that the First Amendment rights of petition, speech, and association protect union members' efforts to, through their union, advise injured workers to obtain legal advice and to recommend specific lawyers. *Brotherhood of Railway Trainmen*, 377 U.S. at 8-9 (1964); a union's employment of a salaried attorney to represent its members in workers' compensation litigation, *United Mine Workers* v. *Illinois Bar*, 389 U.S. 217, 221-22 (1967); and to employ counsel to represent members, to furnish names of injured members to attorneys, and to accept compensation for soliciting clients for counsel, *United Transportation Union* v. *State Bar of Michigan*, 401 U.S. 576, 580-85 (1971). *See also NAACP* v. *Button*, 371 U.S. 415 (1963) (striking down application of state ban on improper solicitation to NAACP's efforts to provide legal representation for persons seeking to vindicate civil rights). The Court has explicitly declared that the principle underlying this series of cases should be applied broadly to protect First Amendment rights:

> At issue is the basic right to group legal action, a right first asserted in this Court by an association of Negroes seeking the protection of freedoms guaranteed by the Constitution. The common thread running through our decisions in *NAACP* v. *Button*, *Trainmen*, and *United Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. However, that right would be a hollow promise if courts could deny associations of workers or others the means of enabling their members to meet the costs of legal representation.

United Transportation Union, 401 U.S. at 585-86.

It is evident that the First Amendment protects individuals' rights to obtain the adequate legal representation necessary to ensure their rights of petition, access to the courts, and association, just as it protects organizations' rights to such representation. As the Supreme Court made clear in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977) the principle underlying the NAACP and union solicitation cases extends to individual efforts to obtain legal assistance. The Court was protecting the organization's efforts because the organizations were working on behalf of their members:

> Underlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups.

433 U.S. at 376 n.32. *See also California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972) (stating that the right to petition protects "the approach *of citizens or groups of them* to administrative agencies" in discussing exemption from antitrust liability for such approaches).

The Supreme Court has also protected individuals' access to legal assistance and information in the context of prisoner litigation. In *Bounds* v. *Smith*, 430 U.S. 817 (1977) the court held that states must protect the right of prisoners to meaningful access to the court by providing law libraries or adequate assistance from legally trained persons. *See also Gilmore* v. *Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger* v. *Gilmore*, 404 U.S. 15 (1971) (invalidating prison regulation severely limiting law books in prison libraries because it denies reasonable access to courts, and noting that right to such access "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary").

The lower courts, too, have recognized that limitations on representation by attorneys trench upon individuals' rights of meaningful access to the courts and to free speech. For example, in *Martin* v. *Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) the Circuit Court for the District of Columbia stated that "while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights." It therefore held that restrictions on federal employees' communications to their attorneys of information exempt under the FOIA "implicates the fundamental right of those employees to meaningful access to the courts" *id.* at 32, as well as their right to speak with their attorneys and their right to effective assistance of counsel. The employees were plaintiffs in a suit against the government. Similarly, in *Fentron Industries* v. *National Shopmen Pension Fund*, 674 F.2d 1300, 1305 (9th Cir. 1982), the Ninth Circuit held that decertifying the class action of a group of employees which had brought suit against the pension trust fund, solely because the suit was solicited by the employer, would impair the associational rights of employers and employees, and would also impair the right to meaningful access to the courts, (*citing United Transportation Union). See also Portland Police Ass'n* v. *City of Portland*, 658 F.2d 1272 (9th Cir. 1981) (Reinhardt, J. dissenting) (dissenting from the majority's determination that the case was not ripe, Judge Reinhardt went on to note that regulation barring police officers from consulting with an attorney prior to filling out an incident report may well implicate the officers' freedom of association, and their right to obtain counsel or legal advice). It thus appears that the individual plaintiffs, as well as the organizational plaintiffs, have First Amendment rights to obtain legal representation at their own expense.

It is also clear that the right to petition ensures meaningful access to administrative agencies, as well as to the courts. As the Supreme Court stated in *California Motor Transport Co.* v. *Trucking Limited*, 404 U.S. 508, 510 (1972), discussing an exemption from the antitrust laws which arises out of the right to petition, that right is not limited to attempts to influence the legislature or executive:

> [t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government.... The right of access to the courts is indeed but one aspect of the right to petition.

See also Clipper Express v. *Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1252-64 (1982) (en banc) (Noerr-Pennington doctrine, which has source in First Amendment right to petition, applies to attempts to influence administrative bodies as well as legislative bodies), *cert. denied*, ___ U.S. ___, 103 S. Ct. 1234 (1983); *Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977)), right to petition protects complaint about IRS agent's professional conduct to his superiors), *cert. denied*, 434 U.S. 975 (1977); *International Union UAW* v. *National Right to Work*, 433 F. Supp. 474 (D.D.C. 1977) (right to petition extends to NLRB as well as courts), *rev'd in part on other grounds*, 590 F.2d 1139 (D.C. Cir. 1978); *Center for United Labor Action* v. *Consolidated Edison Co.*, 376 F. Supp. 699, 701 (S.D.N.Y. 1974) (right to petition extends to all departments of government, including state administrative agencies). Thus, the right to petition applies to plaintiffs' attempts to bring claims before the Veterans Administration. Moreover, the right to effective access to the VA is particularly crucial because the VA is the sole forum in which veterans' compensation

claims may be brought. There is no judicial review of VA decisions on death and disability claims, 38 U.S.C. § 211(a), and veterans cannot sue the federal government under the Federal Tort Claims Act for injuries arising out of military service. *Feres* v. *United States*, 340 U.S. 135 (1950).

Nor does the fact that the veterans are petitioning the VA to obtain economic compensation rather than merely to make a political statement deny them First Amendment protection. *See, e.g., United Mine Workers*, 389 U.S. at 223.[22] The court notes, moreover, that the claims of both the individual and organizational plaintiffs do implicate political values as well, because of their connection with public controversies over the safety of nuclear weapons and chemical defoliants, and the psychological stress allegedly engendered by participation in the Vietnam War. It is also established that the fact that the fee limitation is an indirect rather than a direct limitation on the plaintiffs' rights to petition and associate does not take the statute outside the purview of the First Amendment. As the Court stated in *Brotherhood of Railway Trainmen*, the government can no more indirectly handicap access to the courts by limiting the availability of adequate representation than it can directly limit such access. 377 U.S. at 7.

Finally, it is appropriate to give a potential intrusion on First Amendment rights particular scrutiny where,

[22] Nor does the fact the limitation attacked here is an expenditure of funds for legal representation take the statute outside the purview of the First Amendment. The Supreme Court has recognized that expenditure of funds for advocacy of political or economic interest is protected speech. *E.g., Buckley* v. *Valeo*, 424 U.S. 1, 35-39 (1976) (per curiam) (limits on campaign expenditures restrain speech); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council, Inc.*, 425 U.S. 728, 761 (1976) ("speech does not lose its First Amendment protection because money is spent to protect it").

as in the instant case, the government may be attempting to chill the exercise of First Amendment rights because the exercise of those rights would adversely affect certain of the government's own interests. *See Porter* v. *Califano*, 592 F.2d 770, 780 (5th Cir. 1979) ("Especially where the government is one of the parties in the related litigation, courts must most carefully scrutinize government action which attempts to chill private speech designed to raise funds for the legal fees of the private party litigating . . . .").

In sum, both the individual and organizational plaintiffs have established a high probability of succeeding on their claim that the $10.00 fee restriction impinges their First Amendment rights to petition, and to associate and speak freely. As discussed above with respect to plaintiffs' due process claim, plaintiffs have submitted vast numbers of depositions, declarations, and documents demonstrating that claimants' inability to employ counsel for a fee of more than $10.00 severely impedes their efforts to investigate and present their death and disability claims to the VA. This impediment implicates the First Amendment because it prevents both the individual and organizational plaintiffs from adequately presenting their claims to the VA, an administrative agency.

To determine whether this encroachment will likely be found impermissible, the court must consider whether the government's interest in maintaining the fee restriction is sufficiently substantial so as to justify the interference with plaintiffs' First Amendment rights. However, as discussed *infra* in more detail, the government has presented no such substantial justification. It has sought to defend the fee restriction only with the paternalistic argument that the limitation ensures that recipients' benefits will not be wasted upon unnecessary attorneys' fees. Yet, in the context of the First Amendment such paternalistic arguments are

particularly suspect. *See, e.g., Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (First Amendment assumes "that people will perceive their own best interests if only they are well enough informed"). Moreover, it appears that the government might find ways to protect claimants' financial interests while at the same time respecting their First Amendment rights.

In light of the substantial threat to First Amendment interests and the limited government interests the parties have established are at stake, this court concludes plaintiffs have shown a high probability of success on their First Amendment claim.

Having determined that plaintiffs have made a substantial showing on the merits on their due process and First Amendment claims, the court looks to the other considerations for injunctive relief.

IV. IRREPARABLE INJURY AND BALANCE OF HARDSHIPS

A. Irreparable Injury

In this case the arguments supporting plaintiffs' claims of irreparable injury are bound up in the merits of plaintiffs' claims. The very fact that plaintiffs' claims will continue to be adjudicated, frequently adversely, without benefit of counsel and with no opportunity for judicial review demonstrate the inadequacy of compensatory relief or corrective relief. Irreparable injury inevitably occurs where there are property or other rights which are violated and for which there is no remedy other than injunctive relief. There is no other relief available to plaintiffs.

Often the irreparable injury showing corresponds to and overlaps with the balance of hardships. In such cases there are "competing claims of injury" and the court must balance the "conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 312 (1982), *quoting Yakus* v. *United States*, 321 U.S. 414, 440 (1944).

B. Balance of Hardships

1. *Potential hardship to the government if the preliminary injunction is granted*

The government has failed to demonstrate that it would suffer any harm if the $10.00 attorneys' fee limitation were lifted. It does not and cannot assert a direct financial interest in retaining the $10.00 fee limit. The veterans seek only the right to retain counsel at their own expense, not the right to have counsel provided for them by the government. Nor does the government argue or submit evidence supporting the proposition that abolishing the $10.00 limit would, by permitting the introduction of more lawyers into the system, increase the VA's administrative costs.[23]

The VA's claim of hardship is based primarily on paternalistic arguments. Defendants contend that the fee limitation must be retained to ensure that veterans' benefits are not depleted by attorneys' fees. Whether the lawyers are paid on a contingency fee basis or whether they demand retainers, suggests the government, such payments will likely come out of the veter-

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[23] Defendants attached to their brief in opposition to the motion for preliminary injunction a copy of the "Errata Sheet" which had been part of their earlier motion to dismiss. While in this "Errata Sheet" defendants assert that "[a]nother way in which benefits could be affected is that administrative expenses could be expected to increase causing a general budgetary affect (sic) on the entire Veterans Administration," *id.* at 5, defendants have apparently chosen not to make this argument in their opposition to the motion for a preliminary injunction. The section of the government's brief which discusses the hardship which would be wrought by lifting the $10.00 limit makes no reference to this argument. Moreover, the government has submitted absolutely no evidentiary support for this claim. Thus the claim is not considered by the court.

ans' death or disability benefits. Moreover, suggested the government in oral argument, lifting the $10.00 limit will not assure that all claimants secure an attorney to represent them. Attorneys will pick and choose their cases. And, where attorneys demand retainers, some claimants may simply "sit on their rights" and fail to file a claim.

The government's benevolence seems particularly misplaced where, as here, plaintiffs' claims have been denied. Plaintiffs obviously believe that their own best interests would be served by having the option to secure legal representation in certain cases, thereby increasing their chance of success at the cost of sharing any proceeds with the attorney. Veterans, of course, are adults generally presumed capable of making their own decisions. Moreover, the fact that First Amendment rights are implicated in a veterans' organization or veteran's decision to retain an attorney further undermines the government's paternalistic interest. *Cf. In re Gault*, 387 U.S. 1, 35-37 (1967) (juvenile charged with delinquency has right to counsel and other procedural protections despite government's argument that juvenile proceedings are non-adversarial and safeguard the juvenile's best interest.) Finally, the government could clearly introduce less drastic measures, such as a reasonable percentage limit on contingent fee recoveries, to ensure that a veteran's disability benefits are not completely dissipated by attorneys' fees payments.[24]

The government also argues that granting the preliminary injunction would cause hardship in that "the introduction of a significantly larger number of attorneys would undoubtedly lead to a concomitant use of more formal and/or formalistic procedures." (Defendants' Closing Brief at 7). However, as the government

[24] Congress has, for example, limited attorneys' contingent fee recoveries to 25% in the context of social security benefit claims. 42 U.S.C. § 406.

has neither provided any support for this assertion nor demonstrated why such an increase in formality or even formalism would be detrimental, this purported hardship merits no serious consideration by the court.

2. *Potential hardship to the plaintiffs if the motion for preliminary injunction is denied*

Plaintiffs, by contrast, have demonstrated that they will suffer substantial hardship if the motion for preliminary injunction is denied. As has already been discussed in connection with the due process argument, plaintiffs have shown that many veterans are poor and must depend totally or primarily on SCDD benefits for their support, that the $10.00 limit effectively deprives them of the ability to obtain counsel to represent them before the VA, and that the lack of such legal representation renders veterans unable to effectively present their claims, thereby causing them to suffer great financial hardship and denying them the benefits to which they are entitled.

Plaintiffs have also shown at least a high probability of succeeding in their argument that the $10.00 fee limit deprives them of their First Amendment rights and the Supreme Court has declared that "[t]he loss of First Amendment freedoms, for even minimal periods of time unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (employees whose First Amendment rights were implicated because they were threatened with dismissal unless they endorsed certain political party entitled to injunctive relief). *See also New York Times Co.* v. *United States*, 403 U.S. 713 (1971) (denying government injunction barring publication of Pentagon Papers). Plaintiffs have thus shown the irreparable injury necessary to obtain injunctive relief. Because the balance of hardship also weighs heavily in plaintiffs' favor preliminary injunctive relief is appropriate.

Accordingly,

IT IS ORDERED that the motion for preliminary injunctive relief is GRANTED and that pending a trial on the merits of the above-entitled action, or until further order of this court, defendants, their agents, servants, employees, officers, attorneys, successors, assigns, or any other individual or entity within their control or supervision, and all persons or entities acting in concert with defendants or on their behalf, are hereby enjoined and shall refrain from doing any one or more of the following:

(1) enforcing or attempting to enforce in any way the provisions of 38 U.S.C. § § 3404-3405;

(2) continuing to use, apply or circulate any regulations, forms, correspondence, notices or other documents that refer to, explain, interpret, or state the fee limitation or penalties contained in 38 U.S.C. § §3404-3405; or

(3) failing or refusing to post a summary of this preliminary injunction order in at least one prominent location in every VA office nationwide where SCDD claims are adjudicated or SCDD appeals decided. The parties shall submit such a summary to this court for its approval within twenty (20) days of the date of this order.

Dated: June 12, 1984.

/s/ Marilyn Hall Patel

MARILYN HALL PATEL
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-1861-MHP

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual, plaintiffs,

vs.

HARRY N. WALTERS, Administrator of The Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, San Francisco Regional Office, The Veterans Administration, defendants.

ORDER RE MODIFICATION

Defendants, having filed a Notice of Appeal to the Supreme Court from this court's injunction issued June 12, 1984, filed papers seeking a stay of this court's injunction on June 25, 1984. A hearing was held on defendants' motion on June 27, 1984 pursuant to an order shortening time.

The court, having considered the points and authorities on file and the arguments of counsel, made certain rulings from the bench and ordered that the parties meet and confer so that plaintiffs might submit a written proposed order setting forth the court's findings.

The parties, unable to agree on the content of this order, submitted their separate proposals to the court

along with copies of their correspondence regarding the proposed order. The court, having considered the parties' proposed orders as well as their correspondence, motion papers, and arguments at the hearing,

IT IS HEREBY ORDERED that defendants' motion for a stay is GRANTED in part and DENIED in part as follows:

A. The mandatory requirements of the preliminary injunction are modified as follows pending resolution of defendants' direct appeal to the Supreme Court:

1. On oral argument, defendants have raised a concern as to the cost of compliance with paragraph 2 of the preliminary injunction. This claim finds no support in the record. To ameliorate any possible claim to financial injury, however, in lieu of the changes in forms, correspondence, notices and other documents provided for in paragraph 2 of the preliminary injunction (at 56:18-21), defendants shall either delete any reference to the fee limit from any and all forms, letters, notices, other documents which refer to, explain, interpret, or state, the fee limitation or penalties contained in 38 U.S.C. §§3404-3405, or they shall enclose with each such document a copy of the summary attached to this order.

2. The parties shall meet and confer forthwith concerning circulation of the attached summary to assure insofar as possible that veterans and their potential attorneys are apprised of the preliminary injunction as well as the pendency of defendants' appeal. The parties shall submit a joint list of proposed publications no later than noon of July 27, 1984. If no such list is submitted defendants shall send copies of the summary to all accredited service representatives and organizations and to all state bar associations. Defendants shall also seek publication of the summary in the National Law Journal as well as in whatever Veterans' Administration or vet-

erans' service organization publication has the largest circulation to veterans.

B. In all other respects, defendants' motion for stay is denied, the court finding that:

1. Plaintiffs have a high probability of success on the merits of their First and Fifth Amendment claims for the reasons explained in this court's opinion of June 12, 1984; and

2. Defendants' showing concerning the remaining standards governing a motion for stay is extremely weak. Defendants have failed to demonstrate any irreparable injury or hardship to defendants arising out of the preliminary injunction. The court further finds that in view of the contents of the approved notice there is no prospect of irreparable injury or hardship to veterans or their attorneys arising out of the preliminary injunction.

Dated: July 20, 1984

/s/ Marilyn Hall Patel

MARILYN HALL PATEL
United States District Judge

July 18, 1984

NOTICE TO ALL VETERANS AND V.A. CLAIMANTS REGARDING HIRING OF ATTORNEYS

This is to advise you that on June 12, 1984, a United States District Court issued a preliminary injunction enjoining the Veterans Administration from "enforcing or attempting to enforce in any way" the provisions of 38 U.S.C. §§3404-3405, commonly referred to as the "$10 attorney's fee limitation." *National Association of Radiation Survivors v. Walters, et al.*, C-83-1861 MHP (Northern District of California, June 12, 1984). The Court determined that the plaintiffs had a high probability of success on the merits of their claim that the $10 fee limitation violates both veterans' due process rights under the Fifth Amendment and their right to petition the government and associate freely under the First Amendment. The preliminary injunction provides that it will be effective pending trial on the merits or further court order.

The Order means THAT YOU MAY HIRE AN ATTORNEY OF YOUR CHOICE AND PAY HER/HIM ANY AMOUNT YOU AGREE UPON AND THAT THE TEN DOLLAR ATTORNEY'S FEE LIMITATION IS NOT CURRENTLY IN EFFECT. On June 20, 1984, the government appealed this decision to the United States Supreme Court. You are advised that the Supreme Court might reverse or modify the District Court's decision in whole or in part. ACCORDINGLY, ANY FEE AGREEMENT BETWEEN YOU AND AN ATTORNEY SHOULD TAKE INTO ACCOUNT THE UNCERTAINTY ARISING OUT OF THE ABOVE FACTS. A further notice will be posted in this location should the District Court's order be changed in any way.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-1861-MHP

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual, plaintiffs,

vs.

HARRY N. WALTERS, Administrator of The Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, San Francisco Regional Office, The Veterans Administration, defendants.

ORDER RE POSTING OF NOTICE

On June 12, 1984 this court issued an opinion requiring in part that the parties submit a summary of the court's order to the court within twenty days from the date of the opinion. Such summary was to have been posted in at least one prominent location in every VA office nationwide where Service-Connected Death and Disability ("SCDD") claims are adjudicated or SCDD appeals decided.

The parties, having been unable to reach complete agreement on the form of this notice, submitted their proposed summaries to the court, together with copies of their correspondence setting forth their respective positions.

The court has reviewed the proposed summaries as well as the correspondence. It concludes that the attached summary accurately portrays the court's June

12 opinion as well as its implications. Accordingly, defendants shall post the attached summary immediately in at least one prominent location in every VA office nationwide where SCDD claims are adjudicated or SCDD appeals decided.

Defendants having given no reason for why this notice must be a mere 2 1/2 × 6 inches it is ordered that the notice be printed on 8 1/2 × 11 paper.

IT IS SO ORDERED.

Dated: July 20, 1984

/s/ Marilyn Hall Patel

MARILYN HALL PATEL
United States District Judge

[July 18, 1984]

NOTICE TO ALL VETERANS AND V.A. CLAIMANTS REGARDING HIRING OF ATTORNEYS

This is to advise you that on June 12, 1984, a United States District Court issued a preliminary injunction enjoining the Veterans Administration from "enforcing or attempting to enforce in any way" the provisions of 38 U.S.C. §§3404-3405, commonly referred to as the "$10 attorney's fee limitation." *National Association of Radiation Survivors v. Walters, et al.*, C-83-1861 MHP (Northern District of California, June 12, 1984). The Court determined that the plaintiffs had a high probability of success on the merits of their claim that the $10 fee limitation violates both veterans' due process rights under the Fifth Amendment and their right to petition the government and associate freely under the First Amendment. The preliminary injunction provides that it will be effective pending trial on the merits or further court order.

The Order means THAT YOU MAY HIRE AN ATTORNEY OF YOUR CHOICE AND PAY HER/HIM ANY AMOUNT YOU AGREE UPON AND THAT THE TEN DOLLAR ATTORNEY'S FEE LIMITATION IS NOT CURRENTLY IN EFFECT. On June 20, 1984, the government appealed this decision to the United States Supreme Court. You are advised that the Supreme Court might reverse or modify the District Court's decision in whole or in part. ACCORDINGLY, ANY FEE AGREEMENT BETWEEN YOU AND AN ATTORNEY SHOULD TAKE INTO ACCOUNT THE UNCERTAINTY ARISING OUT OF THE ABOVE FACTS. A further notice will be posted in this location should the District Court's order be changed in any way.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-83-1861-MHP

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS J. WILSON, an individual, plaintiffs,

vs.

HARRY N. WALTERS, Administrator of The Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, San Francisco Regional Office, The Veterans Administration, defendants.

[Filed June 20, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT

Pursuant to the provisions of 28 U.S.C. 1252 the United States and the other defendants, by their undersigned counsel, hereby appeal to the United States Supreme Court from the preliminary injunction issued June 12, 1984.

JOSEPH P. RUSSONIELLO
United States Attorney

By: /s/ Christopher G. Stoll
CHRISTOPHER G. STOLL
Assistant United States Attorney

DATED: June 20, 1984

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
Civil No. C-83-1801-MHP

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL., PLAINTIFFS,

v.

HARRY N. WALTERS, ET AL., DEFENDANTS

[Filed August 20, 1984]

NOTICE OF APPEAL

The defendants through their undersigned attorneys hereby appeal to the United States Supreme Court from the Order re Modification signed by the District Court July 20, 1984.

JOSEPH P. RUSSONIELLO
United States Attorney

By: /s/ George Chris Stoll
GEORGE CHRIS STOLL
Assistant United States Attorney

DATED: AUGUST 20, 1984

(2)

No. 84-571

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, Administrator of Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, Northern California Regional Office, Veterans Administration,
Appellants,

vs.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS WILSON, an individual,
Appellees,

and AMERICAN G.I. FORUM, a national non-profit corporation,
Intervenor-Appellee.

Direct Appeal From the United States District Court For the Northern District of California

APPELLEES' MOTION TO AFFIRM

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70 pp

TABLE OF CONTENTS

	Page
Statement	1
Argument	19
Conclusion	30
Appendix E	62a
Appendix F	71a
Appendix G	75a

TABLE OF AUTHORITIES

Cases

	Page
Cherry v. Steiner, 716 F.2d 687 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1719 (1984)	22
Clark v. Paul Gray, Inc., 306 U.S. 583 (1939)	29
Demarest v. United States, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2150 (1984)	25
Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980)	24
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)	20
Economic Development Corp. v. Model Cities Agency, 519 F.2d 740 (8th Cir. 1975)	20
Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal.), *aff'd per curiam sub nom.* Gendron v. Levi, 423 U.S. 802 (1975)	22, 23, 24, 25
Goldberg v. Kelly, 397 U.S. 254 (1970)	22
Hicks v. Miranda, 422 U.S. 332 (1975)	22
Kleppe v. New Mexico, 426 U.S. 529 (1976)	29
Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979)	22
Love v. Atchison & T. & S.F. Railway Co., 185 F. 321 (8th Cir. 1911)	21
Mandel v. Bradley, 432 U.S. 173 (1977)	22
Mathews v. Eldridge, 424 U.S. 319 (1976)	23
Mayo v. Lakeland Highlands Canning Co., 309 U.S. 310 (1940)	20, 21
Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975)	24
Rostker v. Goldberg, 453 U.S. 57 (1981)	28
Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984)	29
Staub v. Johnson, 519 F.2d 298 (D.C. Cir. 1975)	26, 27

Cases

	Page
Staub v. Roudebush, 424 F. Supp. 1346 (D.D.C. 1976), *vacated and remanded without opinion*, 574 F.2d 637 (D.C. Cir. 1978)	26
United States v. Corrick, 298 U.S. 435 (1936)	21
Vance v. Bradley, 440 U.S. 93 (1979)	29

Constitution, Statutes and Regulations

U.S. Const.:	
Amend. I	2, 21, 26
Amend. V (Due Process Clause)	2, 22, 24
29 U.S.C.:	
§§ 151-169	27
38 U.S.C.:	
§ 211(a)	3, 5
§§ 310-13	3
§ 355	4
§ 3311	18
§ 3404	22
§ 3404(c)	26
§ 4004(c)	5
§ 4005	4
38 C.F.R. (Note: Some C.F.R. (1983) citations will vary from the equivalent C.F.R. (1982) citations in the record below as a result of annual revision.)	
§ 3.102	3, 17
§ 3.103	4, 17
§ 3.103(a)	17
§ 3.103(c)	11, 12
§ 3.158(a)	9
§§ 4.1-4.150	4

TABLE OF AUTHORITIES

CONSTITUTION, STATUTES AND REGULATIONS

	Page
§ 19.118	4
§ 19.118(a)	4, 6
§ 19.119(a)	4
§ 19.119(b)	4
§ 19.120	4
§ 19.121(b)(3)	5
§ 19.123(a)	5
§ 19.129(b)	4
§ 19.157(c)	5
§ 19.165(a)	5
§ 19.180(b)	5
§ 19.182	5
§ 19.184(a)	5
Pub. L. 198, 49 Stat. 449 (1935)	27
Pub. L. 85-56, 71 Stat. 83 (1957)	27
Pub. L. 85-855, 72 Stat. 1105 (1958)	27

Other Authorities

Epictetus *Discourses*, bk. I, ch. 27	3
S. Rep. 97-466, 97th Cong., 2d Sess. (1982)	27, 29
Sup. Ct. R.:	
15(i)	1, 20
16(1)(c)	1
16(1)(d)	1

TABLE OF ABBREVIATIONS

I. DEPOSITIONS

Name	Position	Abbreviation
Hawke, Wesley	Member, N. Cal. Regional Office rating board	Haw.
Jacobsen, Thomas	Legal Specialist, N. Cal. Regional Office rating board	Jac.
Maxwell, Albert R.	SCDD recipient	Max.
Phillips, Dean K.	Attorney Advisor, BVA	Phil.
Polcari, Robert	Assistant to Max Woodall	Pol.
Standefer, Richard	Member, BVA	Stan.
Verrill, Thomas	Adjudication Officer N. Cal. Regional Office	Ver.
Woodall, Max	Director, V.A. Compensation and Pension Service	Wood.

II. DECLARATIONS OR AFFIDAVITS

Name	Description	Abbreviation
Atlee, Walter R.	SCDD recipient	Atlee
Autrey, Clarence W.	SCDD recipient	Aut.
Bakal, Ronald G.	Attorney	Bakal
Bahuss, Mary	Attorney	Bal.
Bianchi, James L.	Attorney	Bian.
Bitzer, Ronald M.	Claims Agent	Bit.
Blecker, Michael A.	Attorney (Swords to Plowshares)	Blek.
Burke, John	SCDD applicant	Burke
Caron, Martha L.	Attorney	Caron
Clapp, Delores	SCDD applicant (widow)	Clapp
Cordray, Don E.	SCDD recipient	Cor.
Dempsey, Lola	SCDD applicant (widow)	Demp.
De Nike, Howard J.	Attorney	DeN.
Deverment, Dennis H.	Attorney	Dev.
Dorfmeier, Glenn	SCDD applicant	Dor.

(Table continued on following page)

(Table continued from preceding page)

Name	Description	Abbreviation
Derhagg, James J.	Special Assistant to BVA Chairman	Der.
Erspamer, Gordon P.	Attorney	Ersp.
Fox, Richard P.	Attorney	Fox
Graham, Harold	SCDD applicant	Grah.
Gretenhart, Frederick H.	Attorney (Swords to Plowshares)	Gret.
Heppenheimer, Harry	Attorney	Hep.
Hollander, Toby H.	Attorney	Hol.
Huskey, Ernest T.	SCDD recipient	Hus.
Johnson, R. Charles	Attorney	John.
Kopelson, Robert B.	Attorney	Kop.
Lenchek, Allen M.	Attorney	Len.
Marozsan, Stephen S.	SCDD Applicant	Mar.
McBee, Thomas	SCDD applicant	McB.
McNeil, J.E.	Attorney	McN.
Miles, Herbert	Attorney (Swords to Plowshares)	Miles
Praiswater, Eldon D.	SCDD applicant	Pras.
Ram, Michael F.	Attorney	Ram
Remcho, Joseph	Attorney	Rem.
Schroeter, Leonard W.	Attorney	Schr.
Siemers, Steven W.	Attorney	Siem.
Souness, Malcolm C.	SCDD applicant	Soun.
Staub, Emanual	SCDD applicant	Staub
Stavick, Margaret	Attorney, PTSD claims	Stav.
Turcotte, Thomas W.	Attorney	Tur.
Udall, Stewart L.	Attorney	Udall
Vaughan, Ralph C.	SCDD applicant	Vau.
Warehime, Reason F.	SCDD recipient	Ware.
Wilson, Doris	SCDD applicant (widow)	Wil.

III. BRIEFS AND OTHER FILINGS

Title	Abbreviation
Complaint for Declaratory and Injunctive Relief filed April 13, 1983	Comp.
Defendants' Answers to Plaintiffs' First Set of Interrogatories dated June 17, 1983	V.A. Int. Ans.
[Defendants'] Supplemental Answers to Interrogatories dated July 15, 1983	V.A. Supp. Int. Ans.
Exhibits to Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Dismiss filed July 19, 1983 and in Support of Plaintiffs' Motion for a Preliminary Injunction filed November 14, 1983	Ex.
Appellants' Application for Stay filed in U.S. Supreme Court on September 21, 1984, No. A-214	Stay App'n
Appellees' Brief in Opposition to Appellants' Application for Stay of Preliminary Injunction Pending Direct Appeal filed September 24, 1984, No. A-214	Stay Opp'n
Jurisdictional Statement filed October 9, 1984	Jur. St.

IV. APPENDICES

Description	Abbreviation
Appellants' Appendices to Jurisdictional Statement (1a-61a)	Apps. A-D
Legislative History of Fee Limitation (62a-70a)	App. E.
Excerpt from Transcript of Hearing Before Three-Judge Court, *Gendron v. Saxbe*, November 25, 1974, commencing on p. 28 (71a-74a)	App. F
Stipulated Facts for Trial, *Gendron v. Saxbe*, dated November 15, 1974 (75a-78a)	App. G

V. TRANSCRIPTS

Description	Abbreviation
Transcript of Hearing on Defendants' Motion to Dismiss dated August 22, 1983	Mt. Dism. Tr.

No. 84-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, Administrator of Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, Northern California Regional Office, Veterans Administration,

Appellants,

VS.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS WILSON, an individual,

Appellees,

and AMERICAN G.I. FORUM, a national non-profit corporation,

Intervenor-Appellee.

Direct Appeal From the United States District Court For the Northern District of California

APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, appellees move to affirm the preliminary injunction issued by the district court based upon the following grounds: (1) It is manifest that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument, Sup Ct. R. 16(1)(c); and (2) Appellants have failed to demonstrate that the district court abused its discretion, Sup. Ct. R. 15(i), 16(1)(d).

STATEMENT

In 1862, responding to reports that unscrupulous attorneys were charging exorbitant fees to complete simple Civil War pension claim forms, Congress prescribed a maximum fee of $5.00 that a claimant could pay an attorney for services performed on pension claims. (*See* App. E). In 1864, the fee limitation was increased to $10.00. The $10.00 ceiling prevails today, despite the intervening adoption of service-connected death and disability compensation ("SCDD") and other benefits, massive V.A. program and budgetary growth, and the increased complexity of V.A. substantive rules and procedures.

Appellees include two non-profit organizations and four individuals. Three individuals are SCDD recipients, two of whom are totally dependent on SCDD for the necessities of life. The National Association of Radiation Survivors ("NARS") is a membership organization comprised principally of survivors of the atomic bomb testing program, including many SCDD recipients. Swords to Plowshares is an accredited service organization dedicated to serving Vietnam veterans, and specializes in handling Agent Orange claims. Albert Maxwell is one of the few living survivors of the Bataan Death March. He spent the remainder of World War II in Japanese POW camps, was a member of a POW clean-up detail at Hiroshima, and now suffers from a host of disabling conditions, including multiple myeloma, a terminal bone disease.

Reason Warehime is a thrice-wounded World War II and Korean War veteran who was among the occupational forces that entered Nagasaki in August 1945. In 1953, Warehime led the advance party at an atomic bomb test and was located a mere 3000 yards from ground zero. He is confined to a wheelchair, and suffers from lung cancer, partial paralysis, and a host of other service-connected conditions. The late Don Cordray succumbed to oat cell carcinoma in March 1984. He witnessed the detonation of Tests Able and Baker from the deck of the USS Fulton during Operation Crossroads in Bikini in 1946. Doris Wilson is the widow of a seaman who died of cancer in 1980 due to radiation exposure during Operation Crossroads.

Appellees charged, and the district court found, that they have a constitutional right to retain attorneys at their own expense unhampered by the $10.00 fee limitation. Appellees complained that the fee limitation deprived them of procedural due process under the Fifth Amendment and of their First Amendment rights to petition the government for a redress of grievances and to freely speak and associate. Unlike those who brought purely facial prior challenges to the fee limitation, appellees documented the adverse effects of the fee limitation on the initiation, development, prosecution, and success of SCDD claims. In addition, appellees proved how the fee limitation deprives them of meaningful access to the V.A. adjudication mechanism, which is the sole avenue by which veterans may obtain redress for service-connected deaths and disabilities. Specifically, appellees showed that the fee limitation discourages the filing of SCDD claims, causes minuscule success rates in complex claims, prevents the utilization of fundamental procedural rights (often as a consequence of waivers solicited by the V.A.), results in the abandonment of large numbers of SCDD claims, and retards correction of the frequent substantive and procedural errors made by the V.A. in adjudicating claims.

a. The description of the V.A. adjudicative system contained in the Jurisdictional Statement departs dramatically from the record, which contains a comprehensive picture of how that system operates in actual practice.[1] What follows is a summary of the V.A. adjudicative system based upon statements by the V.A.'s own witnesses or reflected in the V.A.'s own documents, and other undisputed facts below.

In contrast to the simple pension benefit available during the Civil War, a panoply of veterans benefits now exists, including SCDD. Since World War II, V.A. programs, rules, and regulations have proliferated, and the V.A. annual budget has swelled to over twenty-three billion dollars. V.A. claims procedures are extremely involved. Initial SCDD claims are made to one of fifty-seven V.A. regional offices. The development of a factual record at the regional level is crucial. SCDD claimants must "submit evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." 38 C.F.R. § 3.102. This involves proof that a disability exists or that a death has occurred, and that the disability or death was "service-related." 38 U.S.C. §§ 310-13. Claimants possess a limited number of procedural rights,

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[1] "Appearances to the mind are of four kinds. Things either are what they appear to be; or they neither are, nor appear to be; or they are, and do not appear to be; or they are not, and yet appear to be. Rightly to aim in all these cases is the wise man's task." Epictetus, *Discourses*, bk. I, ch. 27.

This is the first challenge to the fee limitation in which discovery was permitted and the true impact of the fee limitation exposed. The systemic problems uncovered below are a product of three independent prohibitions which have combined to insulate the V.A., and to widen the gulf between administrative appearance and reality. These include: (1) The *Feres* doctrine, which precludes veterans from suing the federal government for service-connected torts; (2) the prohibition against judicial review of V.A. decisions found in 38 U.S.C. § 211a; and (3) the fee limitation.

including a theoretical right to a hearing "at any time on any issue," a conditional right to a hearing transcript, the right to present witnesses and submit documentary and other evidence, and the right to appeal adverse V.A. decisions to the Board of Veteran Appeals ("BVA"). 38 C.F.R. § 3.103; (Ex. 19 at 105). A three-member "rating board," consisting of "medical," "legal," and "occupational" specialists, reviews the veteran's submissions, and prepares a "rating" either granting or denying the claim. *See* 38 U.S.C. § 355; (Exs. 30, 34, 37, 161). The rating board uses a complicated schedule for rating disabilities, which prescribes specific disability percentages for hundreds of conditions. 38 C.F.R. §§ 4.1-4.150; (Ex. 152).

V.A. claim denials are communicated in a computer notice called a Notice of Decision ("ND"). Typically, the ND perfunctorily expresses a denial without factual findings or any explanation. (Comp. Ex. K; Ver. 144). If dissatisfied with the V.A.'s decision, the veteran may submit further evidence and/or request a hearing within sixty days. (*See* Exs. 158, 162).

To challenge an adverse decision, the claimant must file a "Notice of Disagreement" ("NOD") within one year. 38 U.S.C. § 4005; 38 C.F.R. §§ 19.118, 19.119(a). Upon receipt of the NOD, the V.A. either revokes its initial decision or prepares a "Statement of the Case" ("SOC") in which the V.A. frames the issues for appeal. (Ver. 303). The SOC summarizes the decision, the factual record, and applicable law, 38 C.F.R. §§ 19.119(b), 19.120, and constitutes the final decision of the regional office. (*See, e.g.*, Exs. 167 at 101-05, 168 at 135-41). "If the claimant takes no action to follow up on the NOD (which is frequently the case), the file is closed." (Ex. 70 at 71; *see also* Exs. 75, 99 at 6-14).

The claimant can perfect an appeal by filing a "substantive appeal" within sixty days from the date of mailing of the SOC, 38 C.F.R. § 19.129(b), which must "set out

specific arguments relating to errors of fact or law." 38 C.F.R. § 19.123(a). The claimant is presumed to agree with every statement of fact contained in the SOC to which no exception is taken in the Substantive Appeal. 38 C.F.R. § 19.121(b)(3).

Upon filing of a substantive appeal, the original claim file is sent to the BVA in Washington, D.C., for decision. (Ver. 354-55; Ex. 87 Attach. II). Argument and testimony may be presented to a BVA panel, which may or may not be the panel that actually decides the appeal. (Wood. 182-83). *See* 38 C.F.R. § 19.182. Very few BVA appeals result in personal hearings. (Ex. 70 at 71). Consequently, most BVA appeals are resolved based upon the written record transmitted by the regional office, together with a short statement of the veteran's contentions. (*Id.* at 71-72). No cross-examination is permitted in BVA hearings, 38 C.F.R. § 19.157(c), and the BVA "will not require the appearance of any Veterans Administration official or other person" at a BVA hearing, 38 C.F.R. § 19.165(a). (*See also* Ver. 228-30; Wood. 109). The BVA disposes of each issue upon appeal by allowance, denial, remand or dismissal. 38 C.F.R. § 19.180(b). The BVA is bound by V.A. regulations, instructions of the V.A. Administrator, and precedent opinions of the V.A. general counsel. 38 U.S.C. § 4004(c).

The BVA reverses determinations of regional offices in approximately 13% of perfected appeals, and 15% of V.A. appeals result in remands. (Ex. 77; Ver. 134-35). Thus, in over one quarter of the claims reaching the appeal stage, the BVA determines that the regional process (including reconsideration) is deficient. The BVA may reconsider its own decisions based upon errors of fact or law, 38 C.F.R. § 19.184(a), but reconsideration seldom occurs. (Ex. 78 at 2). Decisions of the BVA are final, and judicial review of V.A. decisions is expressly prohibited. 38 U.S.C. § 211(a).

In 98% of BVA appeals, claimants are not represented by attorneys. (*See* Ex. 78). Service representatives handle

87% of perfected appeals and 11% of appealing claimants appear *in pro per.* (Ex. 75). No representation statistics are maintained by V.A. regional offices and representation by attorneys is "not common at all." (Ver. 90-91). Frequently, veterans appear *in pro per.* (Ver. 339). Applications for the $10.00 contingency fee are virtually non-existent. (Ver. 240; V.A. Int. Ans. 3). Thus, the legal services provided by attorneys to veterans are almost invariably *pro bono.*

Several complex categories of SCDD claims have emerged in the last decade, including: (1) claims by veterans exposed to radiation during the atomic bomb tests or to toxic defoliants such as Agent Orange; and (2) post-traumatic stress disorder ("PTSD") claims, first recognized as a disabling condition by the V.A. in 1981. (Haw. 137-41; Jac. 103-07, 134, 167-68; Phil. 31-32, 73-76; Exs. 177-81).

V.A. rules, regulations, and procedures concerning SCDD are intricate and extensive. (Stav. Aff ¶5 at 13-17; Haw. 150-52; Jac. 167-76; Phil. 18-19, 79-84; Ver. 414-29, 431-34, 443-48); *see generally* 38 C.F.R. V.A. regulations contain a wide variety of procedural requirements, many of which are pitfalls for the unwary, such as jurisdictional time limitations. *See* 38 C.F.R. §19.118(a); (Vau. Decl. ¶¶7-8). "Well, as you can appreciate, the claims process is a very complicated process . . ." (Ver. 441). "[V]eterans law consists of a large and relatively complicated body of statutes and regulations that is overwhelming to legal services staff not required to deal with it regularly." (Ex. 70 at 59).

Most of the V.A.'s procedural and substantive standards are unpublished and unavailable to claimants. Procedural Manual M-21-1 (Ex. 17), BVA Manual (Ex. 45), Program Guide 21-2 (Ex. 19), circulars (*e.g.*, Ex. 5), Field Appellate Procedures Manual M1-1 (Ex. 150), adjudication memoranda (Ex. 85; Ver. 299), "informal" memoranda (*e.g.*,

Ex. 17 at 137-38; Wood. 24-27), precedent opinions of the general counsel (Stan. 308-09), and BVA decisions are examples of unpublished sources of V.A. substantive and procedural rules. (Stav. Aff. ¶5 at 15; Ver. 113-15, 207-11, 342-45; Wood. 93-95, 153-54, 197-200; Stan. 277-80, 282-86, 291; Exs. 90, 91; Miles Decl. ¶5; *see also* Ex. 152). "That's the basic point [illegible] we have many directives. And it's a matter of knowing all of them that pertain to a particular point. So it behooves one to keep a cross-index. But they are one as binding as another." (Ver. 344). "[A]rbitrary and unpublished changes in these rules place any individual veteran without representation at an unfair disadvantage." (Miles Decl. ¶5; *see* Exs. 17, 19, 90, 91, 150, 152). In addition, substantive or procedural rules from different V.A. sources often conflict. (Stav. Aff. ¶5D at 19; Ver. 431-34).

Most veterans are unacquainted with V.A. substantive and procedural rules, and are unfamiliar with or lack the expertise to utilize their rights to offer documentary evidence, present their causes at hearings, exercise appellate rights, and exhaust administrative remedies. (John. Decl. ¶¶3-4; Vau. Decl. ¶¶7-8; Demp. Decl. ¶7; Siem. Decl. ¶4; Burke Decl. ¶13; Ver. 153, 210-11, 546-47). Unrepresented veterans experience great difficulties in prosecuting SCDD claims: "[P]eople that don't have representation . . . generally don't have the wherewithal on how to develop their claim . . . . How are they going to know VA procedure? They many times don't really get all their medical records, service medical records. I don't think they do as well generally when they represent themselves." (Phil. 18). The seemingly simple task of locating and obtaining service medical and military records often presents an insuperable obstacle for unrepresented veterans. (DeN. Aff. ¶9; Caron Decl. ¶12; Fox Decl. ¶¶15-17;

Tur. Decl. ¶10; Bakal Aff. ¶1; Stav. Aff. ¶¶5 at 28, 10 at 38-39; Miles Decl. ¶6; Dor. Decl. ¶¶7-8; Max. 85-88; Jac. 234; Wil. Decl. ¶3). The government has lost or destroyed the service records of many veterans. (Soun. Decl. ¶3; Pras. Decl. ¶10; Ver. 63-65, 541-44; Stan. 230; Ex. 19 at 53).

b. The complexity of and veterans' unfamiliarity with V.A. rules, practices and procedures, the absence of legal representation, and the shortcomings of lay service representatives combine to discourage claimants' utilization of procedural rights, cause a startling percentage of SCDD claimants to abandon their claims or appeals, and create a situation in which the merits of large numbers of claims are never reached. (Pras. Decl. ¶9; Burke Decl. ¶13; Phil. 49-50; Cor. Decl. ¶5; Bian. Aff. ¶7; Bit. Aff. ¶4; Max. 81-83; Ware. Decl. ¶12; McB. Decl. ¶11). "Everyone knows lots of claimants are frustrated with the process . . . and have given up on the system . . . ." (Stan. 110-11; *see also* Ver. 559-63; Max. 83). Furthermore, many potential SCDD claimants fail to institute claims because they are unable to retain attorneys to represent them. "Many veterans chose not to go forward because of not being able to hire counsel." (Bakal Aff. ¶1; *see also* Udall Aff. ¶¶1-3; DeN. Aff. ¶5).

While the fee limitation causes some veterans to forsake filing or to abandon claims, many claims are "abandoned" unknowingly. A claimant's failure to comply with procedural requirements often unwittingly results in a constructive claim denial. (Gret. Decl. ¶¶5, 6; Stav. Aff. ¶5 at 29; Ver. 303-07). The claim is automatically denied without notice to the claimant by means of a "record purpose disallowance" upon expiration of the applicable response deadline. (Ver. 303-04; Wood. 63-69; Ex. 17 at 116-17). "This occurs quite frequently where someone is advised by us that they must produce certain evidence and they don't respond to the letter. We make a record purpose disallowance. The claim is considered abandoned a year from the date of our request." (Ver. 304). The veteran may labor indefinitely under the misimpression that his or her claim is still pending. (Wood. 65, 147). "We don't notify them that the decision is final without some inquiry." (Ver. 311). Significantly, "[t]hey're unaware of the record purpose disallowance, so there's no opportunity to appeal." (Ver. 307). An untimely substantive appeal means that, absent a rare finding of a clear and unmistakable error, the merits of an appeal are never reached. (Gret. Decl. ¶5; Ver. 155, 462-63; Ex. 17 at 141). The record purpose disallowance entails a forfeiture of accrued or retroactive benefits if the claim is ever reopened. (Ver. 306); 38 C.F.R. §3.158(a). An overwhelming number of disallowances constitute "record purpose" disallowances and few abandoned claims involve formal withdrawals. (Wood. 236; Ex. 99 at 6-14).

Although claimants who exercise the right to a hearing are almost twice as apt to prevail (Stan. 122, 126, 132-33; Ex. 63), exceedingly few veterans actually request hearings. (Exs. 65, 98; Bit. Aff. ¶4; Ver. 326; Wood. 215-16; Haw. 42, 161; Jac. 8, 28, 127, 144, 201-02). Only 12,196 hearings were held nationally in FY 1982 out of 1,030,884 total actions taken, an incidence of but 1.2%. (Ex. 98 at 3; Wood. 216). Appellate trends are just as pronounced: "[o]f more than 34,000 cases decided by the BVA in FY 1978, only 1,452 involved personal appearances." (Ex. 70 at 81; *see also* Ex. 126; V.A. Int. Ans. 17(a), (b)). "[P]ersonal hearings comprise a very small part of the Board [BVA] workload." (Stan. 268). Given that nearly all claimants are "represented" by service representatives and few hearings are requested, it follows that service representatives (unlike attorneys) do not press for personal hearings. (Jac. 196). "I suspect the service representatives . . . only have hearings where the claimant insists on it or where they think the decision is particularly outrageous in light of the evidence of record." (Jac. 29-30).

Even in the few instances where a veteran exercises the right to a hearing, documentary evidence is rarely submitted, expert testimony is infrequently offered, and normally the claimant alone testifies. The average V.A. hearing lasts only 39.5 minutes. (Ex. 74; Stan. 261-64, 267).

Similarly, the vast majority of unsuccessful claimants "waive" their right to appeal. For example, only 1,954 of the roughly 250,000 appealable San Francisco region decisions (.9%) resulted in NODs in FY 1982. (Ver. 163-64; *see also* Max. 46-48, 81-83). The pattern of frequent waiving of appellate rights continues after an appeal is initiated by filing a NOD. (Ver. 328). The claim abandonment rate between the NOD and substantive appeal stages ranges from 25.6% to 34.8%. (V.A. Int. Ans. 18(c); *see also* Bit. Aff. ¶4). Moreover, the appeal abandonment rate after a substantive appeal is filed and prior to a BVA decision, a period during which no action by the veteran is required, ranges from 2.3 to 4.7%. (V.A. Int. Ans. 18(d)). Significantly, the vast majority of "abandoned" appeals involve inaction by a veteran rather than deliberate action. (Ex. 99 at 6-14; Wood. 236-39). For example, in the first part of 1983, 81.1% of San Francisco region claims in which NODs were filed were "closed" due to the veterans' failure to respond to the SOC. (Ex. 99 at 13). Fewer than 1% were formally withdrawn. (*Id.*; Wood. 236). "Quite a few" unrepresented claimants become "extremely frustrated" and give up. (Wood. 237). In contrast, attorneys almost uniformly follow through on claims to their completion and do a "good job." (Wood. 100; *see also* Ver. 522-24; Ram Supp. Decl.).

Furthermore, a substantial number of veterans neglect to request a hearing transcript, although one is always prepared for the V.A.'s own use. (Ver. 250, 411-14; V.A. Int. Ans. 20). In addition, veterans commonly do not exercise their right to review their claim files, and veterans who have scheduled hearings "fairly commonly" do not

appear. (Ver. 75, 253). Debilitative diseases or conditions suffered by veterans often physically prevent investigation and pursuit of a valid claim or cause claimants to unintentionally abandon their claims. (Cor. Decl. ¶10; Ver. 28-49, 52-53).

By the V.A.'s own self-analysis and admission, erroneous deprivation of SCDD is frequent, as is the incidence of procedural irregularities. (Exs. 10 at 12-15, 85, 94 at 43, 98, 100, 187 *passim;* Wood. 229-32, 246-49; Jac. 167, 261-63; Haw. 69, 80-85, 133). The BVA reverses or remands more than a quarter of the few perfected appeals, and the V.A. has predicted a far higher reversal rate if judicial review of V.A. decisions were allowed. (Ex. 114 at 57-61). It follows that a large number of abandoned claims would have resulted in a grant of compensation had claimants been able to follow through on their claims or had they been represented by counsel.

c. The record reveals many dramatic departures from the Jurisdictional Statement's sanitized picture of regularity drawn from the Code of Federal Regulations ("CFR"). Actual adjudicative policies and practices often markedly diverge from CFR requirements. For example, the regulation that guarantees claimants a right to a hearing "at any time on any issue," 38 C.F.R. § 3.103(c), which the V.A. acknowledged is an "integral part" of due process, was jettisoned by the V.A. in an adjudication memorandum:

> Although VAR 1103 permits a hearing anytime on any issue, we do not have the resources to operate in this way. Hearings should *follow* the Statement of the Case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. We can always explain why a hearing is not appropriate at a particular stage in processing. In cases previously disallowed, the hearing process must be discouraged

> as a means of presenting new and material evidence. . . . I know you are aware of these points but the appellant isn't. To effect this change in policy, employees will obtain the initials of a Section Chief on all requests to 21 to schedule a hearing.

(Ex. 17 at 137-38; Ver. 274-86). Indeed, the V.A.'s long-standing policy has been to ignore 38 C.F.R. Section 3.103 (c), and honor hearing requests only *after* a decision has been rendered, a NOD filed, and a SOC prepared. (*Id.*; Haw. 146-48; Jac. 30-33; Ware. Decl. ¶ 9). Thus, unrepresented veterans are denied hearings before a decision is made—the most meaningful stage in the adjudication of claims. (Wood. 14-16, 28-29; Ver. 276). Because few claims proceed as far as an NOD, the impact upon the 99% of claimants who do not appeal is considerable. Moreover, the few claimants who exercise their truncated post-decisional "right" to a hearing bear the added burden of persuading the rating board to change its mind. Significantly, a rating board member recalled but one instance in ten years in which a personal hearing persuaded him to change an initial decision. (Haw. 43-44, 146, 159-60; *see also* Jac. 29).

Moreover, unrepresented claimants frequently are targets of concerted efforts by V.A. officials to induce them to surrender important procedural rights, *e.g.*, to a hearing. (*See* Comp. Exs. F, H, J; Exs. 2, 11, 17 at 137-38, 18 at 8, 83, 100, 163; Wood. 285-89). The V.A. pattern letter sent to unrepresented claimants who request hearings contains the following false or misleading statements: (1) written statements are equivalent to live testimony; and (2) a hearing request would cause substantial delays before decision. (Comp. Exs. H, J; Ver. 81-85; *see also* Wood. 55-57, 294).

The V.A.'s practice of coaxing waivers from unrepresented claimants is particularly draconian because, in the related area of military discharge upgrading proceedings,

"[t]he chance of success improves markedly when the veteran personally appears before the Boards, a step most veterans are probably unwilling to take without representation." (Ex. 70 at 14). Indeed, the V.A.'s own statistics illustrate that exercise of the right to a hearing is a meaningful incident of a successful V.A. claim. (Ex. 63; Ver. 78; Wood. 58; Stan. 122, 126, 132-33). The SCDD claim allowance rate where BVA hearings were held is nearly double that for appeals in which no hearing occurred. (V.A. Supp. Int. Ans. 17(a),(b) (22.1% vs. 12.9%); *see also* Ex. 126 at 4).

d. The Jurisdictional Statement again departs from the record in describing the lay representation afforded by service organizations. The uncontroverted evidence below demonstrates that service representatives lack the legal training, ability, finances, and resources to adequately represent veterans, especially in complex claims.

The inadequacy of service representatives stems from multiple sources: (1) lack of legal training and skills, and shortcomings in abilities, advocacy, and experience; (2) insufficient financial resources for investigation, use of experts, research, document searches and briefing; and (3) severe overwork and chronic case overload. (Blek. Decl. ¶¶ 2-7; Tur. Decl. ¶ 5; Bian. Decl. ¶¶ 3, 5, 6; Miles Decl. ¶ 5; John. Decl. ¶ 5; Fox Decl. ¶¶ 11-13; Bit. Aff. ¶¶ 4-6; Stav. Aff. ¶ 6 at 32-34; Bal. Aff. ¶¶ 3-4; Ver. 198-201; Stan. 307-08; Ex. 70 at 47-49). The shortcomings of service representatives are magnified in complex claims such as atomic veteran, Agent Orange, and PTSD claims. (McB. Decl. ¶ 13; Burke Decl. ¶¶ 9-12; Aut. Decl. ¶ 5; Max. 37-42, 55-67; Miles Decl. ¶ 5; Bal. Aff. ¶¶ 3-6; Hus. Aff. ¶ B5; *see also* DeN. Aff. ¶ 6; Wood. 93).

"Almost none" of the service representatives is an attorney, and none receives any formal training from the V.A. (Stan. 164-65; V.A. Int. Ans. 33). Nor does the V.A. attempt to assure their competence as representatives:

"Now, the Veterans Administration must accredit each service officer who appears on a regular basis to present claims. But most of this accreditation, as I understand it, goes to good character and that kind of thing, rather than as such competence." (Stan. 323). "They [local service officers] have limited ability, and some of them . . . might even be a volunteer or they're working for the county." (Wood. 192).

The inadequacies of service representatives were documented below in numerous examples drawn from appellees' own claims as well as from a random series of SCDD claim files produced by the V.A. The service representatives' role is typically limited to aiding the V.A.'s search for veterans' medical and service records, occasional assistance in completing basic V.A. forms, and perhaps appearing at any formal V.A. hearings requested. (Haw. 4, 62; Jac. 151-54; Exs. 177-81, 194; Pras. Decl. ¶7-9; Bal. Aff. ¶¶ 3-5, 8, 10). Frequently, veterans "represented" by service representatives prepare their own claims. (Jac. 42-43, 55-56, 67-71, 87, 93-94, 222-23; Max. 37-42). "Most of the time they [service representatives] don't go out and try to develop the evidence on their own." (Stan. 170; *see also* Max. 48-52). "[I]n almost all cases, the record will consist of the claimant's service history and his service medical history." (Stan. 171).

Legal and factual briefing of claims by service representatives, of crucial importance given the low percentage of claims in which hearings are held, is almost nonexistent, and documents are rarely offered to support a claim. (Tur. Decl. ¶ 5; Stan. 182; Wood. 80-81).

> In the majority of cases where the veteran is represented by a veterans' service organization, the veteran's position is typically stated in a one-page handwritten statement of contentions (without argument). . . . It must be stressed that the "one-page handwritten brief" is standard practice among the

> service organizations, and that this practice appears on its face to be less than optimum representation . . . .

(Ex. 70 at 72, 89). The typical substantive appeal prepared by a service representative (which should detail every disagreement with the SOC), is handwritten, comprises one page or less, and fails to respond to the factual points in the SOC. (Ver. 223; Stan. 157; *cf.* Exs. 167, 168).

Service representatives fail to utilize even rudimentary document-gathering techniques, and rarely seek assistance from experts or consultants, even though it is often critical to success. (Wood. 183-84; Caron Decl. ¶ 7; Miles Decl. ¶ 5; Stan. 188; Ver. 234-35). Fundamental legal or tactical errors are common and obvious legal points are frequently overlooked. (Tur. Decl. ¶ 5; John. Decl. ¶ 5; Phil. 17, 33, 60-61; Jac. 177-86; Exs. 158, 162, 172; Ver. 199). Service representatives "seldom" raise questions of law upon appeal, resulting in waivers of any errors of law. (Stan. 159, 291).

"It is normal policy with many of these lay representatives from service organizations to not even review the veteran's case until the day of the hearing." (John. Decl. ¶ 5). Likewise, a service representative's first meeting with the claimant usually occurs thirty minutes before a scheduled live hearing. (Pras. Decl. ¶¶ 7-8; McB. Decl. ¶ 13; Aut. Decl. ¶¶ 5-6; Hus. Aff. ¶ 5; Clapp Decl. ¶ 8; Cor. Decl. ¶ 12; Ware. Decl. ¶ 7; Wil. Decl. ¶¶ 4-5; Soun. Decl. ¶¶ 8-9; Ver. 225; Stan. 166; Burke Decl. ¶¶ 8-9; *see* Ex. 115). At hearings, service representatives commonly rely totally upon the rating board to ask questions. (Ver. 510-11; Ex. 162).

Service representatives handle the vast majority of BVA "hearings" by submitting "informal hearing memoranda" which typically consist of two pages or less, rarely cite authority, and supplant a live hearing. (Stan. 168-69, 184-85; *see also* Ex. 124). The following service representative's statement, designed to "allow the representative to clarify any points in contention or elaborate on them

before the final referral to the Board of Veteran Appeals," is typical of those prepared by service representatives:

> The veteran appeals for service connection for sciatic nerve damage which he contends was caused by injections after contamination by atomic fallout. He believes his arthritis is of many years standing and had its inception during service. The third part of the appeal is for an increased evaluation of his Duodenal ulcer.

(Comp. Ex. A; Cor. Decl. ¶ 9; Ver. 224-25, 486-94; Stan. 184; Exs. 153, 154, 156-57).

Overwhelming caseloads exacerbate the problem. In FY 1982, twelve to fourteen national service officers handled about 95% of the 1,328 central office hearings, or nearly 100 each, as well as a similar percentage of claims in which hearings were waived. (Stan. 299-300). "[T]he case loads of the national level staff appear to be crushing—about 5 cases to present per working day. It is difficult to conceive how effective representation can be provided for that number of cases." (Ex. 70 at 49; *see also* Phil. 33; Jac. 20, 22, 26).

The shortcomings of service representatives and the adjudicative process are starkly evidenced by success rates in complex claims. None of the more than 6,000 Agent Orange V.A. claims has been granted. (Ex. 4; Ver. 116-20; Wood. 138-40). Similarly, only fifteen of over 2,000 atomic veteran claims have been granted, each of which was denied in the initial instance. (Exs. 46, 54 at 9). In short, unrepresented veterans in complex claims lose.

Similarly, the necessity of legal expertise in the adjudication of SCDD claims is demonstrated by the fact that V.A. attorneys pervade every aspect of the adjudication of claims. Over 800 V.A. staff attorneys decide claims, prepare ratings and SOCs, draft BVA opinions, and perform a host of other functions in the adjudicative process. (V.A. Int. Ans. 21, 22; Jac. 10, 144-45, 189-92; Phil. 12-15, 51-52, 69-71; Stan. 32-34). A V.A. rating board member conceded:

> "[I]n a number of cases . . . the veterans would be better off having attorneys represent them, because . . . they would possibly get a fairer shake." (Jac. 20).
>
> [T]here are some cases that are denied because all the evidence hasn't been obtained, and other cases I think are denied because some rating specialists misinterpret the law. . . . [A]n attorney can argue the law much better than a lay person. Of course, an attorney could amass a much better brief of the facts than a lay person could.

(*Id.* at 26; *see also* Hol. Aff. ¶¶ 4, 5; Atlee Decl. ¶ 12; Jac. 15; Soun. Decl. ¶ 6; Phil. 52).

e. Appellants' characterizations of the V.A.'s process as non-adversarial and its own role as supportive contradict the express findings of the district court and find no support in the record. (App. A at 31a-36a). The true, adversarial nature of the relationship between the V.A. and SCDD claimants is emphasized by attorneys familiar with the V.A. and claimants alike. (McB. Decl. ¶¶ 8-12; John. Decl. ¶ 7; Miles Decl. ¶ 6; Caron Decl. ¶¶ 8-9; Bit. Aff. ¶4; Stav. Aff. ¶ 9 at 36-38; Dor. Decl. ¶ 11; Siem. Decl.¶ 4; Cor. Decl. ¶ 13; Wil. Decl. ¶ 6; Ware. Decl. ¶ 12; *see also* Ver. 274-97; Max. 91; Stan. 258-59). The interests of veterans and the government, which is supposed to grant the claimant "every benefit that can be supported in law *while protecting the interests of the Government*" (emphasis added), are not harmonious. 38 C.F.R. § 3.103(a). Significantly, the claimant possesses the burden of proof, 38 C.F.R. § 3.102, and the V.A. in effect acts as both the opposition and judge of the validity of a claim. (Stav. Aff. ¶ 9 at 36-38; McN. Aff. ¶ 7).

Contrary to its own rules and regulations, 38 C.F.R. § 3.103; (Ex. 17 at 142-43 § 18.05), the V.A. fails to assist veterans in developing the facts necessary to support their claims. (Tur. Decl. ¶ 9; Bit. Aff. ¶ 4; McB. Decl. ¶¶ 8-11; Burke Decl. ¶ 13; Pras. Decl. ¶ 10; Dor. Decl. ¶ 7; Ware. Decl. ¶ 9; Grah. Decl. ¶ 9; Demp. Decl. ¶ 7). The "assist-

ance" rendered by the V.A. is typically limited to seeking service and medical records. (Ver. 41). "Well, it's up to the claimant first, yes. I would say the primary responsibility is for the claimant to try to develop the information and the documentation to establish this claim. And then we are secondarily responsible in certain areas." (Wood. 156-57).

Thus, the V.A. makes no effort to cross-reference atomic radiation claims to detect patterns of exposure or disease or locate or interview witnesses to seek information to support a claim. "Ordinarily the burden of that falls to the veteran." (Ver. 23, 126, 313, 480-81; Jac. 104; Ex. 187; Wood. 78, 167-68; Max. 51-52; Stan. 249-51). "We really wouldn't know where to begin to look . . . ." (Ver. 316). Likewise, the V.A. does not request information about similar atomic radiation claims from other regional offices. (Ver. 23, 314). Incredibly, the San Francisco region, for example, has never requested an expert medical opinion on causation or exposure respecting any atomic veteran claim it has adjudicated. (Ver. 36, 51-52, 231, 235; Haw. 163; Jac. 80). The V.A. requested only 202 medical opinions nationwide in FY 1982, or roughly one for every 10,000 claims. (Der. Aff. ¶ 2). Despite the vast number of pertinent documents maintained by the federal government and private entities, the V.A. by directive relies exclusively on the Defense Nuclear Agency to supply information about atomic test programs and radiation exposure levels. (Wood. 208-13; Ex. 84; Ver. 20-23, 98-103, 149-51, 314-19; Stan. 229, 238; Ex. 12 at 33-36). "I can't understand the rationale behind it [the directive]. I still think we should be permitted to develop relevant, persuasive evidence wherever it is." (Wood. 210).

Investigative shortcomings are also common in other SCDD claims. (Bit. Aff. ¶ 3). The V.A. rarely invokes its statutory power under 38 U.S.C. Section 3311 to obtain documents in support of a claim. (Wood. 279). Indeed, the V.A.

has issued only five subpoenas since 1976, most of which sought proof of claimant fraud. (V.A. Int. Ans. 25; Ver. 61-62). Unfortunately, the claimant "is generally unable to discover or obtain government documents." (John. Decl. ¶ 7; *see also* Ver. 255; Miles Decl. ¶ 6; Ex. 114; Wil. Decl. ¶ 3).

The V.A.'s meager development of facts stems in part from its personnel policies and productivity measures. The San Francisco region employs seventy-six claims examiners and clerks to handle approximately 62,000 claims (816 claims per employee), who collectively are allotted only 2.84 hours to develop, process, and decide an initial SCDD claim. (Ex. 9; Ver. 8-13; Haw. 110-13; Jac. 129-30). Time credits are even more modest for deciding reopened claims or appeals, and no credit is given for responding to claimant correspondence. (Wood. 48-54; Ver. 54-59, 167, 194-95). Performance is assessed based in part upon average claim handling time, a system which encourages claims examiners to process claims expeditiously. (Ver. 173; Wood. 53). "[I]t is ludicrous to have such production standards. But they exist, and there is nothing I can do about it, so I live within the system." (Jac. 131). Correspondingly, regional offices that process claims quickly are more highly rated. (Wood. 245-46; Ex. 100).

ARGUMENT

The Jurisdictional Statement represents an attempt to shift the arena in this appeal from the sweeping record relied upon by the district court to an ill-defined legislative one. Thus, appellants avoid the voluminous set of uncontroverted facts upon which the preliminary injunction was based, and frequently make statements dramatically inconsistent with those facts and the findings made by the district court. Appellants even go so far as to suggest that it was *error* for the district court to decide the constitutionality of the fee limitation based upon "the

record that the parties develop in the particular lawsuit." (Jur. St. at 19). Instead, appellants resort to selected quotations, often misleadingly edited, from a few legislative committee reports. Appellants' disregard of the record does not make that record disappear or make some other record that upon which the propriety of the preliminary injunction should be judged. As loathe as appellants might be to appeal based on the record below, it is that record they must confront. *Economic Development Corp. v. Model Cities Agency*, 519 F.2d 740, 744 (8th Cir. 1975) (when ruling on propriety of a preliminary injunction, appellate court must base its review on the record presented to the trial court).

Notably, appellants do not dispute any of the facts upon which the district court determined that the ability to retain attorneys is crucial given the characteristics of the V.A. adjudicative process. (App. A at 23a-38a). Nor do appellants dispute the critical role that the assistance of counsel plays in due process. (*See* cases cited in App. A at 23a-26a).

The Jurisdictional Statement also disregards two of the three factors a court must analyze to determine whether a preliminary injunction ought to issue—the likelihood of irreparable injury, and the balance of hardships—focusing exclusively on probability of success on the merits. Appellants have thus conceded that the district court properly determined that appellees would suffer irreparable injury absent a preliminary injunction, and that the balance of hardships weighed heavily in favor of appellees. (App. A at 48a-51a). Moreover, appellants argue, without citation, that the abuse of discretion standard of review[3] ought to be discarded because of the

[3]Both Supreme Court Rule 15(i) and case authorities uniformly require application of the abuse of discretion standard in appellate review of preliminary injunctions. *Doran v. Salem, Inc.*, 422 U.S. 922, 934 (1975); *Mayo v. Lakeland Highlands Canning Co.*, 309 *(f.n. continued)*

voluminous record below, the very record they have elsewhere spurned. (Jur. St. at 23 n.15). In so doing, appellants have tacitly admitted they cannot establish that the district court abused its discretion, the sole issue involved in this interlocutory appeal. Finally, appellants virtually ignore appellees' First Amendment claim.

Because this appeal depends upon each of the above definitional and analytical errors, it is manifest that the questions on which this appeal rests are so unsubstantial as not to require further argument. For this appeal to succeed, this Court would have totally to discount the record below, disregard appellees' First Amendment claim, transform the three-part preliminary injunction test into a unitary one, and reject uniform precedent requiring application of the abuse of discretion standard in appellate review of preliminary injunctions.

a. The Jurisdictional Statement attempts to divorce the facts from the law, disregarding the crucial role that factual circumstances play in constitutional analysis, especially in claims involving fundamental fairness and access to government agencies. (App. A at 11a). Likewise, appellants disregard the analytical areas of inquiry in a due process case—the private and government interests involved, the risk of erroneous deprivation, and the value of additional safeguards. (*Id.* at 19a-20a). Rather, appellants rely totally upon a narrow argument based on *stare decisis*. Focusing exclusively on appellees' due process claim, appellants hinge their claim to legal error on two decisions finding the fee limitation to be facially valid against due process attack by SCDD applicants. Appellants' own counsel described these decisions as "an anomaly

U.S. 310, 317 (1940); *United States v. Corrick*, 298 U.S. 435, 437 (1936); *Love v. Atchison & T.&S.F. Railway Co.*, 185 F. 321, 331 (8th Cir. 1911) (appeal from order granting preliminary injunction does not invoke judicial discretion of appellate court and should not be reversed unless proof clearly establishes an abuse of discretion).

in the law" and "unsatisfactory." (Mt. Dism. Tr. at 10). These decisions have no application to the type of due process attack mounted by appellees below.

Appellants primarily rely on a summary affirmance in *Gendron v. Saxbe,* 389 F. Supp. 1303 (C.D. Cal.), *aff'd per curiam sub nom. Gendron v. Levi,* 423 U.S. 802 (1975), where a lone SCDD applicant mounted a facial challenge to 38 U.S.C. Section 3404. The district court construed *Goldberg v. Kelly,* 397 U.S. 254 (1970), as holding only that recipients of statutory benefits, as distinguished from applicants such as Gendron, have a Fifth Amendment property interest in statutory benefits. 389 F. Supp. at 1305-06. Notwithstanding this, and the fact that the procedural requirements of due process vary with the particular circumstances, appellants expansively suggest that the summary affirmance in *Gendron* insulates the fee limitation from constitutional attack. *Gendron,* however, is readily distinguished.[a]

The Jurisdictional Statement in *Gendron* presented only the following three issues of potential moment here: (1) Does an applicant have a property interest in disability benefits? (2) Does Section 3404 deny an applicant's right to procedural due process? (3) Did the district court

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[a]Summary dispositions have binding effect with respect to a particular issue only if that issue was "(1) actually decided in the [court below], (2) necessary to the . . . decision [of the court below], (3) presented [to the Supreme Court] in the jurisdictional statement, and (4) necessarily decided by the Court in making its summary disposition." *Cherry v. Steiner,* 716 F.2d 687, 690 (9th Cir. 1983), *cert. denied,* 104 S.Ct. 1719 (1984) (citing *Mandel v. Bradley,* 432 U.S. 173, 176 (1977) (*per curiam*)); *see also Hicks v. Miranda,* 422 U.S. 332 (1975). The precedential significance of a summary affirmance must be assessed in the light of all facts. *Mandel v. Bradley,* 432 U.S. at 177. Furthermore, only questions adequately presented in the record are resolved by a summary affirmance. *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 182-83 (1979).

improperly refuse Gendron's untimely request to submit evidence on the adequacy of representation by veterans service organizations? (Ex. 101). It is impossible to determine whether, in summarily affirming, the Supreme Court found it necessary to reach the second and third issues or based its decision solely on the first issue.

Appellees' due process claim presents at least four due process questions not considered in *Gendron.* First, *Gendron* involved a purely facial challenge—that the fee limitation should be declared unconstitutional without resort to evidence such as the characteristics of the disabled veteran population, the emergence of complex claims, the effects of the fee limitation upon the prosecution and success of claims and adjudicative behavior, or the ability of service representatives to handle V.A. claims. These facts are critical to the determination of what process is due. *See Mathews v. Eldridge,* 424 U.S. 319, 334-35 (1976). By contrast, the instant case involves an as-applied due process attack based upon extant adjudicative rules, procedures, practices and behavior. Unlike *Gendron,* the record here plainly documents the drastic effects of the fee limitation, including waivers of fundamental procedural rights, abandoned claims, infinitesimal success rates in complex claims, hearing waivers, forsaken appeals, and administrative misconduct *vis-a-vis* unrepresented claimants. This considerable wealth of evidence was completely unrebutted below. Courts have long recognized that a statute may be constitutional on its face, but unconstitutional as applied to particular plaintiffs or facts of record. (*See* cases cited in App. A at 10a-11a; Stay Opp'n App. H at 321-22).

Second, Gendron was not a recipient of disability compensation and was not dependent on SCDD for the necessities of life. (App. G). Indeed, the *Gendron* court expressly based its holding upon Gendron's applicant status. 389 F. Supp. at 1306. This holding obviated the need to reach the second

stage of the due process calculus—the balancing of interests. Significantly, Gendron's status as a mere applicant for disability compensation was repeatedly emphasized in the Government's Motion to Affirm in *Gendron*. (Stay Appl. App. D at 7-9). Thus, the Supreme Court's summary affirmance may have been based on Gendron's applicant status. At bar, three individual appellees and many members of the organizational appellees are SCDD recipients whose statutory entitlements stand admitted, whose disability compensation has been reduced or threatened with reduction, and who are primarily dependent upon SCDD for the necessities of life. (Comp. ¶¶ 2-21; Vau. Decl. ¶ 4; Ware. Decl. ¶ 10; Atlee Decl. ¶ 3; Max. 78-80). Notably, the only two decisions to consider whether *recipients* of veterans benefits possess a Fifth Amendment property interest, neither of which is mentioned in the Jurisdictional Statement, ruled in the affirmative. In *Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980), the Ninth Circuit held that student veterans receiving V.A. educational benefits have "a statutory entitlement to receipt of an educational assistance allowance [that constitutes] a 'property right' protected by the Due Process Clause" (citations omitted). Similarly, in *Plato v. Roudebush*, 397 F. Supp. 1295 (D. Md. 1975), the court held that "plaintiffs' interest in receiving continued [V.A. pension] benefits under laws administered by the Veterans Administration is an interest in 'property' within the meaning of the Due Process Clause." *Id.* at 1308 (citations omitted). Significantly, many courts have held that even applicants have a property interest in disability compensation or other statutory benefits. (*See* cases cited in App. A at 16a-17a).

Third, *Gendron* was disposed of summarily at the pleading stage, depriving the plaintiff of any opportunity to initiate discovery. No discovery was taken, and the court acted on a brief set of stipulated facts. (App. G). Consequently, none of the questions raised herein was adequately presented in the record in *Gendron*.

Fourth, appellees have demonstrated the stark inadequacy of representation by service representatives. (App. A at 21a-27a). As noted above, appellees sought aid from service representatives, found their services wanting, and submitted extensive evidence of the inadequacy of service representation, including a series of random samples of claims and briefs prepared by and hearings conducted by service representatives. Gendron did not even seek assistance from a service representative, and none of the stipulated facts related to the adequacy of service representatives. (App. G). Although Gendron belatedly attempted to raise the issue of the adequacy of representation by service organizations, his request at the close of oral argument to the three-judge court for permission to submit evidence on the adequacy of representation was ruled untimely because it was neither alleged in the complaint nor addressed in the stipulated facts. (App. F). Appellants suggest, incorrectly, that this issue was presented and decided on the merits. (Jur. St. at 13-14, n.9). In contrast, the ineffectual nature of lay service "representation" is uncontroverted in the record below.

Demarest v. United States, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2150 (1984), like *Gendron*, involved an applicant's facial challenge to the constitutionality of the fee limitation. In contrast to the complex radiation claims of appellees, Demarest's claim, which he described as "relatively routine," involved simple toe and neck injuries. (Stay Appl. App. F at 6). Furthermore, Demarest neither sought assistance from nor challenged the adequacy of the representation provided by service organizations. Finally, Demarest took no discovery in the district court, and made no attempt to show the negative effects of the fee limitation upon the adjudication of SCDD claims.

b. Barely discernible in the Jurisdictional Statement is the fact that the preliminary injunction also was based upon independent First Amendment grounds. (Jur. St. at

24-25). Appellants claim neither that the factual findings upon which the district court based its First Amendment ruling are erroneous nor that the district court's analysis is flawed. (App. A at 40a-48a). Appellants merely state their belief that the First Amendment issue is not "separate and independent" from the due process question. (Jur. St. at 24). Because appellants skirt the First Amendment issue, appellees simply direct the Court to the district court's extensive analysis of appellees' First Amendment claims. (*See* App. A at 40a-48a). The district court properly determined that: (1) the First Amendment rights to petition, association, and speech protect efforts by organizations to obtain effective legal representation for their members or constituents and the right of individuals to retain attorneys at their own expense; (2) the fee limitation deprives appellees of meaningful access to the V.A. adjudicatory system, the sole avenue by which they may obtain redress for their service-connected deaths and disabilities; and (3) appellants raised no government interest in preserving the fee limitation, but merely sought to assert paternalistic arguments on behalf of veterans.

No prior decision concerning the $10.00 fee limitation addresses the First Amendment claims advanced by appellees. Yet, appellants contend that *Staub v. Roudebush*, 424 F. Supp. 1346 (D.C.C. 1976) (*"Staub II"*) (*on remand* from *Staub v. Johnson*, 519 F.2d 298 (D.C. Cir. 1975) (*"Staub I"*) (holding substantial federal question presented)), *vacated and remanded without opinion*, 574 F.2d 637 (D.C. Cir. 1978) (*"Staub III"*), "rejected an indistinguishable First Amendment challenge to Section 3404(c)." (Jur. St. at 25 n.18). This contention is erroneous. First, the district court's decision in *Staub II* was vacated without opinion in *Staub III* and has no precedential value. Second, the First Amendment claim in *Staub II* was limited to the right of freedom of association. Third, *Staub II* did not address the First Amendment rights of organizations to provide

legal services to their members or constituents with respect to Staub's claim. *Staub I* remains the only Circuit Court of Appeals First Amendment decision on the fee limitation, and it clearly supports the substantiality of appellees' freedom of association claim. 519 F.2d at 302.

c. The Jurisdictional Statement principally focuses on a selected rendition of legislative events concerning various pieces of omnibus legislation to allow judicial review of SCDD decisions, revise the fee limitation, and effectuate other changes in veterans' legislation. (Jur. St. at 14-24). While the conceptual and legal bases of their arguments are unclear, appellants appear to be raising two separate contentions. First, appellants suggest that Congress has made "findings of fact" concerning the fee limitation, to which this Court should defer. (*Id.* at 19). Second, appellants urge the Court to draw the inference that the fee limitation is fair because Congress has never repealed it. (*Id.*)

When Congress passes a law it may make findings of fact and set them forth in the statute or its preamble. For example, in passing the National Labor Relations Act, 29 U.S.C. Sections 151-69 (originally Pub. L. 198, 49 Stat. 449 (1935)), Congress made specific findings that were embodied in the statute. Appellants, however, fail to identify what findings of fact they contend Congress made in enacting the fee limitation. In fact, Congress made no findings of fact when it enacted the most recent version or earlier versions of the fee limitation. *See* Pub. L. 85-855, 72 Stat. 1105 (1958); Pub. L. 85-56, 71 Stat. 83 (1957); (*see also* App. E). Thus, there are no legislative findings of fact to which the district court should have or could have deferred. Indeed, appellants did not even raise this argument below.

Appellants fix upon a single report of the twelve-member Senate Committee on Veterans Affairs, S. Rep. 97-466, 97th Cong., 2d Sess. (1982) (the "CVA Report"), implying that it contains legislative findings of fact. (Jur. St. at 3, 8,

16-17). Significantly, the CVA Report was submitted in connection with the Committee's 12-0 vote to favorably report a bill that would have changed the fee limitation. The House version of the bill was never reported out of committee. Thus, the CVA Report was not passed by the entire Senate or by the House and does not constitute legislative findings of fact. *Compare Rostker v. Goldberg*, 453 U.S. 57, 73-74 (1981) (both houses of Congress adopted the findings of the Senate Armed Services Committee by passing their report). Rather, it represents only the views of twelve Senators, all of whom thought that the $10.00 fee limitation should be eliminated.

Moreover, the Jurisdictional Statement recites the following misleading quote from the CVA Report: "there has developed 'a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants.'" (Jur. St. at 8). This statement is drawn from the following passage in which the Committee criticizes the current fee limitation:

> The basis for Congressional action, first after the Civil War and then after World War I, limiting the amount an attorney could receive for representing a claimant before the VA, was grounded in a belief that the lawyers of that day were unscrupulous and were taking unfair advantage of veterans by retaining an unwarranted portion of the veterans' statutory entitlement in return for very limited legal assistance. Whatever the merits of such a view at the time that the limitation was imposed . . . it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable.
>
> The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters. As noted above, there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants. The Committee fully expects and believes that this system will continue and prosper, undiminished by the new right of judicial review and opportunity for attorney participation created in this legislation. However, an individual should not be arbitrarily restricted in retaining an attorney . . . .

S. Rep. 97-466, 97th Cong., 2d Sess. 50-51 (1982). Thus, the Congressional report to which appellants point concludes that the fee limitation constitutes an arbitrary and undue restriction on the right to counsel. That this is the only report which appellants quote to support their argument that Congress has made legislative "findings of fact" is telling. Congress has never made the legislative findings of fact attributed to it by appellants.

Moreover, even if Congress had made findings of fact, the deference standard enunciated by appellants is inapplicable here. The "deference" authorities cited by appellants involve either application of the "rational basis" test, which is not the appropriate standard in a procedural due process or First Amendment case, or instances in which Congress has set forth specific findings of fact in the text of the challenged statute.[4]

---

[4]For example, *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984), involved a claim that a federal statute requiring disclosure of information in order to register pesticides was an unconstitutional taking of property. The applicable test was whether the conditions under which the data were submitted were "rationally related to a legitimate government interest." *Id.* at 2876, 2880 n.18. Both *Vance v. Bradley*, 440 U.S. 93, 94-97 (1979) and *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 594 (1939), were equal protection challenges, and, like *Monsanto*, involved application of the rational basis test. In *Kleppe v. New Mexico*, 426 U.S. 529 (1976), the Wild Free-Roaming Horses and Burros Act contained specific findings in the text of the challenged statute.

Appellants' second argument, that the Court ought to infer that the fee limitation is fair from Congress's failure to amend the fee limitation, is even less persuasive. First, no inferences can properly be drawn from a negative vote on proposed legislation. For example, legislators may have felt the proposed legislation did not go far enough, as suggested by the bill mentioned by appellants which would have preserved the $10.00 fee limitation intact through decision by the BVA. (Jur. St. at 17 n.11). Second, the $10.00 fee limitation has never been separately considered by Congress, but has always been considered as part of omnibus legislation to revamp the entire V.A. adjudicative system. Appellants are in no position to speculate as to the reasons why Congress has failed to rectify the deprivation of constitutional rights caused by the fee limitation. Moreover, that Congress has failed in its responsibility furnishes no basis for urging this Court to do so.

CONCLUSION

For all the foregoing reasons, the Court should summarily affirm the preliminary injunction issued by the district court.

Dated: November 13, 1984

ROBERT D. RAVEN
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GORDON P. ERSPAMER*
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(Appendices follow)

Appendix E

HISTORY OF THE AGENT AND ATTORNEY FEE LIMITATION WITH RESPECT TO VETERANS' BENEFIT CLAIMS

The first legislation to limit the fees of agents or attorneys who assisted a claimant for military service-related benefits, an Act to Grant Pensions, was passed on July 14, 1862. (12 Stat. 568). Congress authorized a fee of $5.00 for attorneys assisting in the prosecution of pension or bounty claims. This statute expressly stated that the fee limit pertained to the *execution of applicant declarations, affidavits and requisite correspondence*, and it provided for payment of an additional $1.50 per affidavit in cases where the Commissioner of Pensions required additional testimony. In 1864, this act was amended, raising the authorized fee to $10.00 and making its payment contingent upon successful prosecution of the pension claim; however, the new statute again makes it clear that the services for which the attorney was to be remunerated consisted simply of filling out the necessary forms. (13 Stat. 397).

During the next half century, no fewer than 11 new statutes were enacted in which flat fee limitations were imposed on attorneys or agents who assisted claimants in filing applications for pensions. (*See* Attachment 1). In each of these instances, all of which concerned applications for pensions or bounties, the role of the attorney or agent considered by the legislators was that of filling out the necessary papers in an original claim.

In 1917, however, when Congress amended a 1914 act establishing the War Risk Insurance Program (38 Stat. 711), an implicit distinction was drawn between the clerical function of completing forms and more complex tasks performed by attorneys. Thus payment of attorneys' fees equal to 10% of the amount recovered was authorized by the amended act only for litigated cases, while fees were pro-

hibited for assistance in filing original claims. (40 Stat. 102). Additional amendments introduced in 1917 instituted death and disability compensation for commanding officers, enlisted men, and Army and Navy nurses. Again, payment of 10% of amounts awarded in litigated cases was authorized, but no fees were permitted for agents and attorneys assisting with filing original claims. (40 Stat. 405).

This act was amended in 1918, and additional attorneys' fees of $3.00 were authorized for "such assistance as may be required in the preparation and execution of the necessary papers" in filing original claims. The percentum fee in "the event of disagreement as to a claim under the contract of insurance between the Bureau and any beneficiary or beneficiaries thereunder" was again authorized, but was reduced to 5%. (40 Stat. 555).

Enactment of the War Risk Insurance Program raised the fear that overreaching attorneys tempted by the 10% fee allowance would exploit veterans. In his letter of March 18, 1918, to Congressman Sims, Secretary of the Treasury W. G. McAdoo expressed his concern thus:

> Unscrupulous attorneys and claim agents are circularizing prospective claimants with literature in which they seek to neutralize the warnings of the department by assertions that their employment will facilitate the prompt allowance of the claims.

H.R. Rep. No. 471, 65th Cong., 2d Sess. (1918).

The fear that unprincipled attorneys would exploit the beneficiaries of veterans' benefit was shared by Congressman Treadway. Referring to the loss of the *Tuscania* during the House debates on April 17, 1918, he said:

> These [attorneys] have been so solicitous with their business that they have even gone to the extent of notifying the next of kin of an entire shipload being lost, when half or more of them were saved. The Adjutant

> General's office informed me that it had referred three telegrams of that nature to the Department of Justice in order to prosecute these claim agents for misrepresentation and the injury to the feelings of relatives that naturally would result.

56 Cong. Record 5222, col. 1 (April 17, 1918).

Although considerable reliance was apparently placed upon such reports, at no point in this debate was it suggested that the appropriate remedy might consist of prosecuting or disciplining individuals who had made such misrepresentations, instead of imposing a flat fee limitation.

In any case, however, there were dissenting voices. Congressman Dewalt, for example, in the course of the same debate, addressed his remarks to the concern that the veteran be afforded a genuine opportunity for redress in settling disputes. Considering the situation where the Veterans Bureau had turned down a veteran's insurance claim, he said:

> The party disagrees with the Bureau and says, "I am entitled to full compensation." He has lost both legs, or an eye and one leg, and therefore he claims full compensation . . . . The government says, "You are not entitled to it." Necessarily there must be litigation. The gentleman from Iowa [Mr. Green] says, "Refer it to the Bureau itself." Refer it to the party who is interested for the government? I say, "No." I say let the matter be determined by a jury of the claimant's peers. Let it be determined in the situs of the claim by people who are entirely unprejudiced in the matter, and let a jury of his peers determine as to whether or not a claimant has a just claim . . . .
>
> Mr. Green: Does the gentleman mean to say that the Government officials are a prejudiced party?
>
> Mr. Dewalt: I admit this, and I am very loathe to say it, that the Government Officials as a rule, not

only in pension cases, but in other cases, hew very strictly to the line and adhere precisely to what they know the law to be, and there are equitable cases that possibly would be better determined by a jury of 12 than by any other tribunal that could be established.

Mr. Madden: If the department had already decided the case against the claimant, it would be likely to make an adverse decision, would it not?

Mr. Dewalt: Certainly. They would be prejudiced. The man convinced against his will remains of the same opinion.

56 Cong. Record 5225, col. 2 (April 17, 1918).

It is clear from the debate that those congressman who were opposed to judicial review and the awarding of attorneys' fees assumed, as then may have been the case, that claims cases before the Veterans Bureau were non-adversarial in nature. Congressman Green insisted, "The government ought not to take the position that is often taken by insurance companies, and try to defeat every claim that is possible regardless of its merit; but, on the contrary, pay every one that is meritorious, and pay every cent to which the claimant is entitled."

Equally clearly, there were others in the House at this time who felt that this assumption was a tenuous one. Congressman Juul made the following plea:

> I am afraid that the $3.00 limitation and a provision in the penalty clause of the bill is going to work harm. I know of cases where three consecutive sets of papers in a single case are and have been missing for claims arising since the war, where allotments have not been made .... If a claimant today in any state in the union goes out and tells an attorney that he is limited to $3.00, that he has waited three or six months to get action on his claim, he is going to get no legal service

> that can be of any value to him .... The aim of this bill is to help the claimant and not to hurt him, and I think the penalty clause as it now stands is such that no reputable attorney anywhere in the country, unless for purely patriotic purpose, will help the claimant to get his money.

56 Cong. Record 5225, col. 1 (April 17, 1918).

Also in the course of this debate, it was again made clear that the flat fee limitation imposed by Congress was intended to apply only to the performance of clerical tasks in preparing a pension claim, as distinct from the gamut of more complex tasks required in litigation:

> Mr. Snook: Now, this bill is so drawn ... that these attorneys cannot collect a fee for services in any one of these cases, except under regulations to be formulated and promulgated by the Bureau of War-Risk Insurance. It was suggested to the committee, however, that it might be necessary, and probably was necessary, that some compensation should be allowed to someone for preparing the papers for applicants, and so the fee for that purpose was fixed in the bill at $3.00 ....
>
> Mr. Linthicum: The gentleman says "preparing papers"; that is merely filling up a blank.
>
> Mr. Snook: *That is merely filling up a blank.*

56 Cong. Record 5223, cols. 1 & 2 (April 17, 1918) (emphasis added).

Congressman Treadway reiterated this point and went on explicitly to acknowledge the assumption that, apart from litigated insurance cases, there was no need for attorney services beyond that of simply filling out forms:

> Mr. Treadway: May I call the gentleman's attention to the fact that there are two places where attorneys or claims agents are recognized? One is in the prepara-

tion of the papers and the execution of necessary papers, where not to exceed $3.00 may be charged. *That is simply a clerical service.* Then, you will see the bill also recognizes attorneys in connection with the suit.

Mr. Juul: Yes.

Mr. Treadway: There is no other place where the claim agent can legally perform services, and it is not intended that there should be.

56 Cong. Record 5223, col. 1 (April 17, 1918) (emphasis added).

The act which was passed following this debate (40 Stat. 555) reduced the percentum allowance in litigated insurance cases from 10% to 5% of the amount awarded, and authorized a fee of $3.00 for assisting and preparing necessary claim papers.

During the next few years, several new statutes appeared which were again concerned exclusively with pension cases: in 1918, attorneys' fees of $10.00 were allowed for assistance in processing claims for pensions granted to widows and minor children of veterans who served in the war with Spain, the Philippine Insurrection, or in China (40 Stat. 903); in 1920, this act was amended by raising the attorney fee to a maximum of $20.00 (41 Stat. 982); in 1922, another amendment extended the classes of eligible individuals and again reduced the attorney fee limit to $10.00 (42 Stat. 834). An act authorizing "adjusted service pay" in 1924 specified payment of additional compensation to veterans of the first World War, setting maximum allowances at different rates depending on rank, type and location of service, and prohibiting payment of attorneys' fees. (43 Stat. 121).

Later, in 1924, a more comprehensive statute, which included medical, surgical, hospital, and convalescent care, insurance, vocational training, medical examination and rating, and death and disability compensation, authorized

a $10.00 fee for assistance in preparation of a claim, and 5% of the amount recovered in litigated insurance cases. (43 Stat. 607). An amendment to this act in 1925 again increased the amount of attorneys' fees authorized in litigated insurance cases from 5% to 10% of the amount recovered. (43 Stat. 1302).

During the next five years, another series of acts limiting attorneys' fees pertaining to a variety of specific groups eligible for pension benefits was passed by Congress. (*See* Attachment 1).

The next broad-reaching piece of legislation, the Consolidation Act of 1930, established the Veterans Administration through a merger of the Pension Bureau, United Veterans Bureau and the National Conference for Disabled Volunteer Soldiers. (46 Stat. 1016). No change was made at that time with respect to provisions prescribing agent or attorney fee limitations.

In 1936, a new law authorized recognition of representatives of designated veterans' organizations and prohibited the payment of any fee for their assistance in prosecuting claims; in addition, it authorized the Veterans Administration to recognize other agents and attorneys, and in this case fixed a $10.00 fee limitation for preparation of claims brought under statutes administered by the V.A. The distinction first drawn in 1917 was preserved in this act, however, as courts were still authorized to award "reasonable attorneys' fees" not to exceed 10 percent of the amount awarded in litigated insurance cases. (49 Stat. 2031).

A further consolidation of laws administered by the Veterans Administration was effected in 1957 (71 Stat. 83), and these were recodified in 1958 (72 Stat. 1106), placing the $10.00 attorney fee limitation in 38 U.S.C. § 3404 and the percentum allowance for actions in a court of law in 38 U.S.C. 701 *et seq.*, where they remain today.

Attachment

(a) In 1866, an act authorizing "Bounties to Colored Soldiers and the Pensions, Bounties and Allowances to Their Heirs" set a fee limitation range of from $5.00 to $10.00, depending upon the amount of the claim collected. (14 Stat. 367).

(b) A fee limit of up to $25.00, subject to approval by the Commissioner of Pensions, was authorized for claims for pension or bounty land in 1870. (16 Stat. 193).

(c) The fee limit in pension cases was again limited to $10.00 in 1878. (20 Stat. 243).

(e) In 1890, a $10.00 attorney fee was authorized for preparation of claims for pensions granted to incapacitated soldiers and sailors. (26 Stat. 182).

(f) In 1892, an act granting pensions to Army nurses prohibited payment of attorneys' fees. (27 Stat. 348). Similarly, fees were prohibited in acts granting pensions to remarried widows (31 Stat. 1445) in 1901, and to veterans of the Civil War and the War with Mexico in 1907. (34 Stat. 879).

(g) In 1912 and 1916, acts extending certain pension benefits authorized attorneys' fees of $10.00 in the preparation of initial claims. (37 Stat. 112 and 39 Stat. 844).

(h) In 1926 an act granting pensions to veterans (and their widows) of the Civil and Mexican Wars, widows of the War of 1812 and to Army nurses, again authorized attorneys' fees of $10.00 for assistance in filing original claims. (44 Stat. 806).

(i) In an act amending the World War Adjustment Compensation Act, also in 1926, payment of any attorney fee was again prohibited. (44 Stat. 826).

(j) Attorneys' fees of $10.00 were again authorized in a 1927 act extending pension benefits to veterans of the Indian Wars for 1817 to 1898. (44 Stat. 1361).

(k) In 1928, attorneys' fees were again prohibited in an act granting pensions to widows and former widows of Civil War veterans. (45 Stat. 714).

(l) In 1930, an act increasing pensions to veterans and nurses of the War with Spain, the Philippine Insurrection and the Chinese Relief Expedition again authorized attorneys' fees of $10.00 for the preparation of original claims. (46 Stat. 492).

Appendix F

In the United States District Court
Central District of California

Honorable M. Oliver Koelsch, Honorable E. Avery Crary,
Honorable Malcolm M. Lucas, Judges Presiding

No. 73-2241-EC

Ronald Gendron
Plaintiff,

v.

Honorable William B. Saxbe,
Attorney General of the United States, et al.,
Defendants.

Reporter's Transcript of Proceedings
Place: Los Angeles, California
Date: Monday, November 25, 1974

Virginia K. Wright
Official Reporter
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(p. 26) Mr. DeVermont: Oh, we have one offer of proof, your Honor, if you would like it. That would be an offer of proof on the adequacy of lay representation, if your Honors feel it is necessary.

Judge Crary: Offer of proof as to the adequacy?

Mr. DeVermont: Yes, your Honor.

Mr. Tepper: We have a live witness, Mr. Patrick J. Wood, who is the Director of the Los Angeles County Funded Veterans Average Program, who is here today, and we would propose to make an offer of proof to submit an affidavit or to present live testimony, whichever your

Honors prefer, if any of those are agreeable to your Honors, if your Honors believe any are pertinent.

We have heard that your Honors have stated that lay representation might be an issue and its availability might be an issue. If that's the case, the adequacy of lay representation should also be an issue.

Judge Crary: Do you have an affidavit?

Mr. Tepper: We did, your Honor, and we've already submitted a copy to the Government.

Judge Crary: What's the Government's position?

Ms. Reynolds: Your Honor, basically, the affidavit is from a lay person who says it's his opinion that lay representation is not sufficient. I would submit that certainly the weight of the affidavit—

Mr. Tepper: Actually a second-year law student, your Honors. It is true he's not an attorney.

Judge Crary: The feeling is we should not take any testimony as to the facts, so we'll not take any testimony or any affidavit on the matter.

Mr. Tepper: Your Honor, might I be heard further for one moment, to clarify something?

Judge Crary: All right. Your time is long up, but go ahead.

Mr. Tepper: Yes, I know, your Honor. I apologize for that—we apologize for that.

When we were contacted by your law clerk, he asked us if we and the Government would be willing to enter into stipulations as to facts, but there was never any indication at that time nor was there any indication or stipulation of facts that those were all the facts involved and that other facts might not either be relevant at that time or might crowd up or become relevant. Therefore, I submit if your

Honors are concerned with the availability of lay counsel, the adequacy of lay counsel is just as important an issue.

Judge Crary: We're not going to open that up now. If that had been an issue and insisted that you wanted to be heard on, why, we would have decided it. But we're not going to open it now, with you being in the position of having a lay witness which you know is going to testify it's not sufficient and the Government not being in a position to counteract it. It wouldn't be a fair procedure. So that's the ruling, that you not be allowed to offer any evidence on it.

Mr. Tepper: Thank you, your Honor. That concludes our case, your Honor.

Appendix G

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United States District Court
Central District of California

CV 73-2241-EC

Ronald Gendron
Plaintiff,

v.

Honorable William B. Saxbe,
Attorney General of the United States; et al.,
Defendants.

STIPULATION OF FACTS FOR TRIAL

The Parties hereto, by and through their respective undersigned counsel, hereby Stipulate to the following facts, for the purposes of trial in this action:

1. That Plaintiff Ronald Gendron [hereinafter referred to as "Gendron"] is a male citizen of the United States and a resident of Los Angeles County, and was born on August 24, 1948;

2. That Gendron enlisted in the United States Air Force on or about February 6, 1969, and prior to his enlistment took and passed a required pre-enlistment physical examination;

3. That as the result of a psychiatric evaluation conducted at the USAF Hospital, Chanute AFB, Illinois on or about May 14, 1969, at which time Gendron was found to be suffering from psychiatric problems, Gendron was discharged from the United States Air Force as "unsuitable," on or about June 20, 1969;

4. That Gendron's discharge aforesaid was under Honorable conditions;

5. That on or about July 8, 1972, Gendron presented a claim to the Veterans Administration [hereinafter referred to as the "VA"] for disability benefits as a veteran;

6. That the VA gave Gendron an examination on or about January 29, 1973 and after consideration of Gendron's application by a ratings board determined, on or about March 2, 1973 that Gendron was not entitled to veterans disability benefits;

7. That Gendron appealed the VA's adverse determination on or about May 3, 1973;

8. That Gendron thereafter attempted to retain an attorney to represent him in his appeal to the VA aforesaid, but was unable to retain an attorney by reason of the $10

fee limitation of 38 U.S.C. § 3404, according to the six (6) attorneys whom Gendron had contacted;

9. That Gendron is not eligible for the services of a legal aid attorney by reason of the fact that he was not financially qualified therefor, since Gendron then had, and currently has, money in a savings account obtained in a personal injury settlement in excess of the amount of money an individual is permitted to have who is eligible for legal aid assistance;

10. That Gendron did not apply to the American Legion or the Veterans of Foreign Wars [hereinafter referred to as the "VFW"], or any other patriotic or veterans or service organization for assistance with his appeal before the VA;

11. That the reason Gendron did not apply to the said patriotic / veterans / service organization, including the American Legion and the VFW was because Gendron was informed that said organizations do not supply assistance from attorneys, but only from lay persons;

12. That, in fact, the American Legion, the VFW, and other patriotic/veterans/service organizations, do offer assistance to needy veterans in matters of this kind, but the individuals representing veterans at VA hearings are lay persons and not attorneys;

13. That Gendron has received the following aid, from the following agencies, at the following times, after findings by the agencies, under their own separate and applicable regulations and definitions of "total disability" or "unemployability," that Gendron was totally disabled and/or unemployable by reason of his mental condition;

(a) Aid to the Totally Disabled (ATD) from the State of California, monthly checks from October 14, 1970 to March 3, 1973;

(b) Social Security Disability (SSD) from the Social Security Administration, monthly checks from March 1, 1973 to November 2, 1974 (said date being of the last check received by Gendron);

(c) Aid to the Totally Disabled (SSI) (California's contribution to the Supplemental Security income fund administered by the Social Security Administration), monthly checks from March or April 1973 to November 2, 1974 (said date being of the last check received by Gendron);

14. That since March, 1973, Gendron has been and remains under the weekly care of psychiatrist whose services are paid by the federal "Medicare" program.

15. It is further stipulated that the documents set forth in Plaintiff's Exhibits "A", "B", "C", "E", "F", "G", "H", "I", "J", "K" & "L", and the documents set forth in Defendant's Exhibits are authentic, and are true and accurate copies of the original documents which they purport to represent.

WHEREFORE, upon said Stipulations of the above facts, they are deemed to be admitted and need not be proved.

Dated: November 15, 1974.

SCOTT J. TEPPER
CAROLE E. GOLDBERG
DENNIS H. DEVERMONT
A.L. WIRIN
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(3)

No. 84-571

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, Administrator of Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, Northern California Regional Office, Veterans Administration,
Appellants,

vs.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS WILSON, an individual,
Appellees,
and AMERICAN G.I. FORUM, a national non-profit corporation,
Intervenor-Appellee.

Direct Appeal From the United States District Court For the Northern District of California

[redacted]

MOTION TO AFFIRM

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INTERVENOR-APPELLEE'S JOINDER IN MOTION TO AFFIRM

The American G.I. Forum, Intervenor-Plaintiff below and Appellee herein, fully joins in the "Motion to Affirm" filed by Appellees National Association of Radiation Survivors, *et al.*

The American G.I. Forum, the nation's largest Hispanic membership organization, in joining the motion to affirm incorporates by reference the record and arguments pre-

sented by the other appellees herein and offers the following three brief observations in support thereof:

1. The Appellants' Jurisdictional Statement is an elaborate and skilled legal camouflage of a reality that no court, particularly this Court, can or should ignore. In an increasingly complex society, governed by increasingly obscure and changing statutes, regulations and informal codifications of procedures, it is a rare individual, even in a so-called "non-adversarial" system, who is better off without a skilled lawyer. This is particularly so when the class of persons consists of a large number of non-high school graduates and few college graduates and, by definition, many who are physically and mentally disabled.

2. The arguments in favor of the paternalism that underpin the Appellants' position are contrary to the free market principles and consumer free choice philosophy that pervades comparable briefs filed by the Attorney General and Solicitor General in the federal courts during the last four years. As a consequence, the Solicitor General offers no justification for distinguishing between the need for paternalism here, where it is *unwanted,* and other antitrust and consumer cases before this Court where the Solicitor General urges a free market even if the affected parties oppose such.

3. In a judicial era where criminals are guaranteed the right to counsel and the poorest welfare recipient is permitted even in the simplest of cases to have counsel in suits against the government, it is exceedingly difficult, if not impossible, to appreciate the rationale or justification for abridging the First and Fifth Amendment rights of those who have fought to make those rights possible for all Americans.

Dated: November 8, 1984

Respectfully submitted,

ROBERT L. GNAIZDA
Attorney for Intervenor-Appellee
(American G.I. Forum)

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BRIEF *AMICUS CURIAE* OF THE DISABLED AMERICAN VETERANS IN SUPPORT OF THE UNITED STATES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. PRINCIPLES OF JUDICIAL RESTRAINT, IMPROPERLY IGNORED BY THE DISTRICT COURT, APPLY TO THIS CONTROVERSY BECAUSE OF THE COURT'S HISTORICAL SOLICITUDE IN THIS AREA AND CONGRESS' PLENARY CONSIDERATION OF VA BENEFIT SYSTEM PROCEDURES AND REPEATED RECENT DETERMINATIONS TO LEAVE THEM UNCHANGED 5

II. BY MISCONSTRUING THE NATURE OF THE PRIVATE INTEREST INVOLVED, UNDERVALUING THE QUALIFICATIONS OF VETERANS SERVICE OFFICERS AND FAILING TO CONSIDER IMPORTANT NON-FINANCIAL GOVERNMENT INTERESTS, THE DISTRICT COURT STRUCK A SKEWED DUE PROCESS BALANCE 11

A. Preservation of the $10 Fee Limitation Would Foster the Psychological Value of Meaningful Communication of Veterans' Claims By and Through Similarly Situated Disabled Service Officers 13

B. The Extensive Training, Agency Familiarity, Organizational Expertise and Special Motivation of *Amicus Curiae's* National Service Officers, When Combined With the Nonadversarial Setting of VA Claims Administration, Minimize the Risk of Error Which Paid Attorney Involvement May Increase 15

TABLE OF CONTENTS

Page

C. The Non-Financial Government Interests of Preventing the Diversion of Veterans' Benefits, Maintaining Nonadversarial Proceedings Involving Veterans, and Preserving Veterans' Organizations' Full Capacity to Represent Claimants and Assist the Congress, Warrant Upholding the $10 Fee Limitation 23

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES:

"Agent Orange" Product Liability Litigation, In Re, MDL No. 381, slip op. (E.D.N.Y. Jan. 7, 1985) . 20n, 24n

"Agent Orange" Product Liability Litigation, In Re, MDL No. 381, slip op. (E.D.N.Y. Sept. 25, 1984) . 20n

Califano v. Boles, 443 U.S. 282 (1979) 15

Califano v. Yamasaki, 442 U.S. 682 (1979) 16n

Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973) 8, 9, 10

Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980) 13

Fullilove v. Klutznick, 448 U.S. 448 (1980) 10

Gagnon v. Scarpelli, 411 U.S. 778 (1973) 21, 23

Gendron v. Levi, 423 U.S. 802 (1975), *aff'g Gendron v. Saxbe,* 389 F. Supp. 1303 (C.D. Cal.) 12n

Goss v. Lopez, 419 U.S. 565 (1975) 21, 23, 25

Johnson v. Robison, 415 U.S. 361 (1974) 5, 6

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 21

Landon v. Plasencia, 459 U.S. 21 (1982) 11

Mathews v. Eldridge, 424 U.S. 319 (1976) ..... *passim*

McCarty v. McCarty, 453 U.S. 210 (1981) 11n

Mitchell v. Cohen, 333 U.S. 411 (1948) 5, 24

Morrissey v. Brewer, 408 U.S. 471 (1972) 21

TABLE OF AUTHORITIES — Continued

Page

National Ass'n of Radiation Survivors v. Walters, 589 F.Supp. 1302 (N.D. Cal. 1984) ..... *passim*
Ortwein v. Schwab, 410 U.S. 656 (1973) 27
Parham v. J.R., 442 U.S. 584 (1979) 21, 25
Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 5, 6, 24
Pratte v. N.L.R.B., 683 F.2d 1038 (7th Cir. 1982) 12n
Primus, In Re, 436 U.S. 412 (1978) 27n
Regan v. Taxation with Representation of Washington, 461 U.S. 540 (1983) 5, 6, 24
Santosky v. Kramer, 455 U.S. 745 (1982) 8n, 10
Schweicker v. McClure, 456 U.S. 188 (1982) 12
Triumph Hosiery Mills, Inc. v. Triumph International Corp., 308 F.2d 196 (2d Cir. 1962) 12n
United States v. Kras, 409 U.S. 434 (1973) 10
United States v. Swords to Plowshares, No. CR-84-776 (N.D. Cal. Nov. 6, 1984) 9n
Vitek v. Jones, 445 U.S. 480 (1980) 17, 21, 23
Wolff v. McDonnell, 418 U.S. 539 (1974) 21, 23, 25
Woodby v. INS, 385 U.S. 276 (1966) 10

UNITED STATES CONSTITUTION:

Article I, Section 8 ..... 11n
First Amendment 4, 5, 10, 27n
Fifth Amendment ..... *passim*

FEDERAL STATUTES:

10 U.S.C. §§ 1551 *et seq.* 22n

TABLE OF AUTHORITIES — Continued

Page

26 U.S.C. § 501(a) 2
26 U.S.C. § 501(c)(4) 2
36 U.S.C. §§ 90a *et seq.* 2
36 U.S.C. § 90c 3, 26
36 U.S.C. § 90e 2
36 U.S.C. § 90i(b) 2
38 U.S.C. § 211(a) 6
38 U.S.C. § 3301(d) 18
38 U.S.C. § 3402 ..... 8n, 18
38 U.S.C. § 3402(a) 2
38 U.S.C. § 3404 ..... 3, 6
38 U.S.C. § 3405 ..... 3, 6
38 U.S.C. § 3502(b) 9n
Pub. L. 98-542, 98 Stat. 2725 (1984) 19n, 20
Supreme Court Rule 36 ..... 1n

FEDERAL REGULATIONS:

38 C.F.R. § 3.103(b) 16
38 C.F.R. § 4.125 ..... 20n
38 C.F.R. § 4.126 ..... 20n
38 C.F.R. § 14.628(d)(4) 22
38 C.F.R. § 14.629(a) 2

CONGRESSIONAL MATERIALS:

119 Cong. Rec. H10622 (daily ed. April 2, 1973) 17
131 Cong. Rec. H102 (daily ed. Jan. 7, 1985) 9
131 Cong. Rec. H129-130 (daily ed. Jan. 22, 1985) 9

TABLE OF AUTHORITIES — Continued

Page

FY82 Legislative Recommendations of Veterans' Organizations: Hearings Before the Senate Comm. on Veterans' Affairs, 97th Cong., 2d Sess. (1982) 25n

H.R. 313, 99th Cong., 1st Sess. § 401 (1985) 9

H.R. 585, 99th Cong., 1st Sess. § 401 (1985) 9

Hearings on Legislative Recommendations, etc., Before the Senate Comm. on Veterans' Affairs, 96th Cong., 2d Sess. (1980) 11n, 25

Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983) 6n, 7n

Readjustment Counseling: Hearing Before the Sub-Comm. on Hospitals and Health Care of the House Comm. on Veterans' Affairs, 97th Cong., 1st Sess. (1981) 19n

S. 330, 96th Cong., 1st Sess. (1979) 7n

S. 349, 97th Cong., 2d Sess. (1982) 7n, 15

S. 636, 98th Cong., 1st Sess. (1983) 7n

S. Rep. No. 97-466, 97th Cong., 2d Sess. (1982) 16, 17, 24, 26

Sixty-Third National Report, Disabled American Veterans, 1983, H.R. Doc. No. 98-150, 98th Cong., 2d Sess. (1984) 3

Veterans' Administration Adjudication and Judicial Review Act, etc.: Hearing Before the Senate Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983) 6n

TABLE OF AUTHORITIES — Continued

Page

Veterans' Administration Analysis and Evaluation, etc., 95th Cong., 2d Sess., Report by the Administrator of Veterans' Affairs (House Comm. Print 1978) . 11n

Veterans' Administration Evaluation of Benefits, etc., 95th Cong., 2d Sess., Report by the Administrator of Veterans' Affairs (House Comm. Print 1978) 11n

Veterans' Claims for Disabilities for Nuclear Weapons Testing: Hearing Before the Senate Comm. on Veterans' Affairs, 96th Cong., 1st Sess. (1979) 19

Veterans' Exposure to Agent Orange: Hearing Before the Senate Comm. on Veterans' Affairs, 98th Cong. 1st Sess. (1983) 20

MISCELLANEOUS:

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) 20n

APA Monitor, April, 1979 19

Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 467 (1975) 24n

The Forgotten Warriors: New Concern for the Vietnam Vet., BEHAV. MED. 38 (July, 1979) 19

POST-TRAUMATIC STRESS DISORDERS OF THE VIETNAM VETERAN: OBSERVATIONS AND RECOMMENDATIONS FOR THE PSYCHOLOGICAL TREATMENT OF THE VETERAN AND HIS FAMILY (T. Williams ed. 1980) 19

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OCTOBER TERM, 1984

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BRIEF *AMICUS CURIAE* OF THE DISABLED AMERICAN VETERANS IN SUPPORT OF THE UNITED STATES

INTEREST OF *AMICUS CURIAE*[1]

The Disabled American Veterans ("DAV") is one of the nation's largest nonprofit veterans' organizations, chartered

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[1] Pursuant to Supreme Court Rule 36, written consent to the filing of this brief has been obtained from counsel for all parties and the letters of consent have been filed with the Clerk of the Court.

in 1932 by an Act of Congress, 36 U.S.C. §§ 90a *et seq.*, and exempted from federal income taxation under the Internal Revenue Code. 26 U.S.C. §§ 501(a) and 501(c)(4). Membership in DAV is restricted essentially to those persons disabled in time of war while serving in the armed forces of the United States and subsequently discharged under honorable conditions. 36 U.S.C. § 90e. DAV has more than 900,000 members, of whom nearly 300,000 are disabled Vietnam veterans.

DAV's principal activities are the conduct of various programs designed to assist member and nonmember veterans alike in obtaining the fair compensation, adequate medical care and suitable employment to which their disabling wartime military service entitles them. As reflected in DAV's most recent audit report submitted to the Comptroller General of the United States for the year ended December 31, 1983, *see* 36 U.S.C. § 90i(b), the annual budget for the operation of these programs is in excess of $25 million.[2] Approximately $18 million, or 70% of that program budget, is used to maintain the largest service program of all the nation's veterans' organizations.

DAV's service program is conducted by a paid professional staff of more than 250 full-time employees called National Service Officers ("NSOs"). During 16 months of initial training conducted by DAV, each NSO must secure accreditation from the Veterans' Administration ("VA") as a representative of DAV, a recognized service organization. 38 U.S.C. § 3402(a); 38 C.F.R. § 14.629(a). This accreditation authorizes the NSO to assist veterans in making claims under laws administered by the VA. DAV has NSOs assigned to every VA Regional Office in the United States and Puerto Rico, certain VA Medical Centers, the Pentagon and elsewhere, totaling approxi-

[2] Approximately 80% of DAV's annual financial support derives from public donations; the balance is roughly divided among investment income and membership dues. More than 60% of DAV's total revenue is devoted to the operation of these programs.

mately 70 office locations. In addition, NSOs regularly provide services to veterans living in more remote areas of the country through the operation of DAV's Mobile Field Service Unit Program. As an indication of the scope of NSO representation, in the year ended June 30, 1983, NSOs obtained more than 100,000 powers of attorney from veterans seeking some form of claims assistance. *Sixty-Third National Report, Disabled American Veterans, 1983*, H.R. Doc. No. 98-150, 98th Cong., 2d Sess. 102 (1984).

DAV has developed its extensive national service program as a primary means of fulfilling its statutory purposes to advance the interests of disabled veterans and cooperate with the VA. 36 U.S.C. § 90c. This development has been possible because the claims representation services of NSOs have been provided to all veterans free of charge, thereby complying with the $10 fee limitation imposed by the statutory provisions challenged in this case. 38 U.S.C. §§ 3404-05. An examination of the nature of DAV's service program and the VA claims representation services provided to veterans from other sources will necessarily play an important role in this Court's analysis of the constitutional issues presented herein. Because the outcome of this case will therefore unavoidably raise an inference about the adequacy of DAV's most significant nonprofit activity on behalf of disabled veterans, DAV seeks this opportunity to present its views to this Court as *amicus curiae*.[3]

[3] At the Government's request and without the benefit of its own counsel, DAV provided information of record in the District Court proceedings. Mr. Charles E. Joeckel, Jr., DAV's National Director of Services, executed a declaration ("Joeckel Decl.") attached to the closing brief filed on November 21, 1983, in support of the Government's opposition to appellees' motion for a preliminary injunction.

SUMMARY OF ARGUMENT

The District Court demonstrated an insufficient regard for a coordinate branch of government when it preliminarily enjoined the operation of the statutory provisions at issue. In light of the facts that Congress has repeatedly rejected modification of the statutory scheme that includes those provisions after having thoroughly considered the same veterans' interests at conflict in this case, and that it now has before it again similar proposals for reform, this Court should hesitate to displace legislative competence with constitutional adjudication, especially with regard to subject matter historically treated with judicial deference. When examined with principles of restraint in mind, it is evident that the judgment under review proceeds from an application of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), that strikes an analytically and factually deficient balance of due process considerations and concludes with an unjustified extension of First Amendment doctrine.

The private interests of veterans in the property at stake include a psychological value fostered by the free claims assistance rendered by disabled service officers that calls for maintenance of the challenged $10 fee limitation. The unusual qualifications possessed by these service officers particularly enable them to function in the nonadversarial proceedings of the VA with an effectiveness that yields a more than acceptable risk of erroneous claim determination — a risk that an influx of paid attorneys, with its predictably formalizing effect on agency behavior, could well increase rather than diminish. The Government's substantial non-financial interests in guarding against unnecessary legal expenses and preserving an informal benefit system supported administratively and legislatively by strong veterans' service organizations demonstrate finally the validity of the status quo as a matter of due process of law. The existing statutory and regulatory scheme also adequately safeguards the First Amendment rights of petition and free

speech of appellees, whose associational rights have not been abridged by the fee limitation because of their economic motive.

ARGUMENT

I. Principles of Judicial Restraint, Improperly Ignored by the District Court, Apply to This Controversy Because of the Court's Historical Solicitude in this Area and Congress' Plenary Consideration of VA Benefit System Procedures and Repeated Recent Determinations to Leave Them Unchanged.

This Court has traditionally given Congress a wide constitutional berth in enacting statutes for the benefit of those who have served in the armed forces of the United States. *See, e.g., Regan* v. *Taxation with Representation of Washington*, 461 U.S. 540 (1983) (upholding tax exemption of veterans' organizations against equal protection and First Amendment challenges); *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256 (1979) (upholding Massachusetts veterans' preference law against equal protection challenge); and *Johnson* v. *Robison*, 415 U.S. 361 (1974) (upholding "G.I. Bill" for veterans against equal protection and First Amendment challenges). This historical solicitude has in part been based upon the "moral obligation and debt of gratitude," *Mitchell* v. *Cohen*, 333 U.S. 411, 420 (1948), that the country owes to veterans for their subjection to "*the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life.*" *Johnson, supra*, 415 U.S. at 380 (emphasis in original).

In such cases, the parties seeking relief have not, as a general rule, shared the interests of the veterans for whose benefit the

statutes challenged by these parties were enacted. *See, e.g., Regan, supra* (challengers were charitable organizations not including veterans' groups); *Feeney, supra* (challenger was nonveteran woman); and *Johnson, supra* (challenger was conscientious objector). Accordingly, the special obligation owed to veterans could be invoked without compromise to shield the statutes under attack and thus preserve Congress' attempt to discharge the nation's obligations to the veteran-beneficiaries of the enactments.

In this case, however, the original parties seeking relief — appellees herein — are two veterans' organizations and four individual veterans. Since the nation's special obligation runs in part to the challengers of the statutory provisions at issue here, 38 U.S.C. §§ 3404-3405, the degree to which that obligation operates to shield those provisions is unclear. This uncertainty is enhanced by DAV's own alignment as *amicus curiae*. On the one hand, DAV would generally support the District Court's view as to the importance of veterans' benefits made available under Title 38 of the U.S. Code. *National Ass'n of Radiation Survivors* v. *Walters*, 589 F.Supp. 1302, 1314-1315 (N.D. Cal. 1984) ("*NARS*"). *See infra* p. 13. Indeed, as a matter of policy, DAV has no objection to modification of the fee limitation provisions attacked by appellees, to the extent that the current prohibition under 38 U.S.C. § 211(a) of judicial review of decisions by the VA Administrator is also modified.[4]

[4] *See Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 22 and 154 (1983) ("House Hearings") (statement of John F. Heilman, DAV National Legislative Director); *Veterans' Administration Adjudication and Judicial Review Act, etc.: Hearing Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 237 (1983) ("Senate Hearing") (statement of Mr. Heilman). DAV would have no objection to the payment of reasonable fees by veteran claimants for attorney representation in judicial review proceedings, as distinguished from proceedings conducted under laws administered by the VA. House Hearings, *supra*, at 34; Senate Hearing, *supra*, at 250.

On the other hand, DAV vigorously supports the United States and opposes appellees in defending the constitutionality of the $10 fee limitation under the current statutory scheme. Although this fundamental conflict between the positions of DAV and appellees shifts some component of the special obligation running to veterans away from appellees and back to the defenders of the statutes, that traditional basis for deference to Congressional action remains of uncertain strength. DAV submits, however, that the conflict of veterans' interests herein provides an independent basis for this Court to exercise self-restraint in considering the constitutionality of the $10 fee limitation.

The independent basis for the Court to stay its constitutional hand arises from the fact that essentially the same multiplicity of veterans' interests at work in this case has recently and consistently been resolved by the Congress in favor of preserving unchanged the statutes challenged here. For the last three consecutive Congresses, the statutory scheme containing the $10 fee limitation has been the subject of intense Congressional scrutiny without ultimate legislative action.[5] DAV has provided extensive testimony on the legislative proposals considered by the Congress in this regard, *see, e.g., supra* note 4, while other veterans' organizations that support appellees in this litigation have also presented views to the Congress on these same legislative proposals to modify the fee limit.[6] The refusal of Congress to enact legislation disrupting the statutory scheme

[5] In each of the 96th, 97th and 98th Congresses, the Senate passed a bill modifying, *inter alia*, both the judicial review and fee limitation provisions of Title 38. The House, however, refused to adopt companion measures, thus preventing agreement with the Senate that might have permitted alteration of the statutory scheme. *See* S. 636, 98th Cong., 1st Sess. (1983); S. 349, 97th Cong., 2d Sess. (1982); S. 330, 96th Cong., 1st Sess. (1979).

[6] *See, e.g.*, House Hearings, *supra* note 4, at 73-76 (statement of John F. Terzano, Legislative Director, Vietnam Veterans of America ("VVA")). VVA is expected to file herein a brief *amicus curiae* in support of appellees.

after plenary consideration of these proposals reflects the judgment of Congress that the competing interests among veterans with respect to statutory reform are properly balanced by the maintenance of the status quo.[7]

As this Court observed in upholding another statutory and regulatory scheme (the Fairness Doctrine) against constitutional attack: "Congress and its chosen regulatory agency have established a delicately balanced system of regulation intended to serve the interests of all concerned." *Columbia Broadcasting System* v. *Democratic National Committee*, 412 U.S. 94, 102 (1973) ("*CBS*"). DAV submits that Congress is constitutionally better equipped not only to make comprehensive inquiry into the procedural operation of the VA benefit system, but also to assess the weight that should be accorded the views of those, like DAV, of whom it makes such inquiry so as to balance "the interests of all."[8] This is especially so when the environ-

[7] Appellees reject this implication because "the $10.00 fee limitation has never been separately considered by Congress." Appellees' Motion to Affirm ("Mot. to Aff."), at 30. But the fairness of a complicated and interrelated statutory and regulatory scheme for mass claims administration cannot sensibly be judged piece by piece, but rather must be examined as a whole. The principle emerges in the Court's own due process examinations:

> [I]t is obvious that a proper due process inquiry cannot be made by focusing upon one narrow provision of the challenged statutory scheme. Such a focus threatens to overlook factors which may introduce constitutionally adequate protections into a particular government action. *Santosky* v. *Kramer*, 455 U.S. 745, 775 (1982) (Rehnquist, J., dissenting).

[8] For example, the status of a service organization recognized by the VA carries with it implications of organizational standing and experience with the VA claims administration process that are familiar to Congress and are undoubtedly taken into account by it when considering the effect of testimonial information. In this regard, DAV was included by name in the statute authorizing such recognition when it was enacted. 38 U.S.C. § 3402. With respect to the two original organizational plaintiffs in this case, however, appellee National Association of Radiation Survivors is not recognized by the VA. Appellee

ment in which the scheme operates is "dynamic." *Id.* That characteristic is applicable to the modern VA benefit system, which has witnessed the development of DAV's (and other organizations') service programs contemporaneously with the increasingly complicated nature of benefit claims "arising from such causes as exposure to atomic radiation or Agent Orange, or from Post Traumatic Stress Syndrome." *NARS, supra,* 589 F.Supp. at 1320.

A final consideration bearing upon the degree to which the respect due a coordinate branch of government is implicated in this case was also noted in *CBS, supra*. There, the Court commented that the agency administering the constitutionally challenged regime was conducting a "wide-ranging study" of the scheme that had gotten underway during the pendency of the case, stating: "At the very least, courts should not freeze this necessarily dynamic process into a constitutional holding." 412 U.S. at 132. Similarly here, the Legislative Branch has during the last three Congresses considered (and rejected) proposals to modify the fee limitation and other related provisions of Title 38. *See supra* note 5. In addition, in the 99th Congress, bills have already been introduced which, if enacted, would modify the $10 fee limit. H.R. 585, 99th Cong., 1st Sess. § 401 (1985) (introduced by more than eighty-five (85) original sponsors, *see* 131 Cong. Rec. H129-130 (daily ed. Jan. 22, 1985)); H.R. 313, 99th Cong., 1st Sess. § 401 (1985), *see* 131 Cong. Rec. H102 (daily ed. Jan. 7, 1985). There is more than equal reason here to allow Congress, in its "continuing search," *CBS, supra,* 412 U.S. at 132, for a means to balance all the competing interests of veterans, to proceed without its

Swords to Plowshares Veterans Rights Organization has been so recognized, but its status may be adversely affected by its recent criminal conviction under 38 U.S.C. § 3502(b) for accepting payment from the VA with the intent to defraud the Government. *United States* v. *Swords to Plowshares*, No. CR-84-776 (N.D. Cal. Nov. 6, 1984).

options being unduly restricted by a constitutional holding. *See United States* v. *Kras*, 409 U.S. 434, 451 (1973) (Burger, C.J., concurring) (observing, in the context of a Congressional commission's continuing review of the bankruptcy laws: "The Constitution is not the exclusive source of law reform, even needed reform, in our system.").

The rule of according "great weight to the decisions of Congress" has been applied when a statute "raises equal protection concerns," *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980), and when legislation implicates fundamental rights under the First Amendment, as appellees assert here. *See, e.g., CBS, supra*, 412 U.S. at 102. One analytical consequence of applying the rule in these kinds of cases may have been a reduction in the magnitude of the governmental interest required to justify the effect of the challenged enactment on the constitutional rights involved.

The rule of restraint should have a like effect in resolving a due process challenge, but the strength of the governmental interest required to uphold a statute against a due process attack has not been differentiated by the Court as it has in First Amendment and equal protection cases, where a compelling or substantial increment can be demanded — and offset by the exercise of restraint. Accordingly, one way DAV might characterize the analytical consequence of applying the rule to appellees' due process claim is that Congress' comparatively more comprehensive institutional powers to inquire into the fairness of the procedural aspects of the VA benefit system and to weigh the competing interests among those affected by it, at least when those powers have been fully exercised and are being invoked again, call for a suspension of the ordinary rule that the judiciary is the expert among the Branches on matters of procedure. *See, e.g., Santosky, supra* note 7, 455 U.S. at 755-756 (standard of proof "is the kind of question which has been traditionally left to the judiciary to resolve.") (quoting *Woodby* v. *INS*, 385 U.S. 276, 284 (1966)). To put the proposition alternatively: "The role of the judiciary . . . does not extend to imposing procedures that merely displace congressional choices of policy." *Landon* v. *Plasencia*, 459 U.S. 21, 34-35 (1982).[9]

II. By Misconstruing the Nature of the Private Interest Involved, Undervaluing the Qualifications of Veterans Service Officers and Failing to Consider Important Non-Financial Government Interests, the District Court Struck a Skewed Due Process Balance.

DAV will conform its due process argument to the three-factor test set forth in *Mathews, supra*, 424 U.S. at 335, to dem-

[9] The contribution of VA disability benefits to the strength of the nation's active military forces is of particular relevance in this regard given Congress' power to "raise and support Armies . . . and maintain a Navy." U.S. Const. art. I, § 8. As far back as the 16th century, England enacted a statute for the relief of disabled veterans after battle with the Spanish Armada "to encourage others to serve," *Veterans' Administration Evaluation of Benefits, etc., 95th Cong., 2d Sess., Report by the Administrator of Veterans' Affairs* 1 (House Comm. Print 1978). In this country, the Continental Congress enacted the first national legislation to assist those with service-connected disabilities "to encourage enlistments." *Id.* at 4. Even before the Revolutionary War, veterans' benefits were provided by Plymouth Colony "to encourage the colony's soldiers against the Indians." *Veterans' Administration Analysis and Evaluation, etc., 95th Cong., 2d Sess., Report by the Administrator of Veterans' Affairs* 5 (House Comm. Print 1978). Continuing into the present, the Chairman of the Senate Veterans' Affairs Committee affirmed that efforts to "maintain our national security . . . include our commitment to those who must wage the war after they have served." *Hearings on Legislative Recommendations, etc., Before the Senate Comm. on Veterans' Affairs*, 96th Cong., 2d Sess. 63 (1980) ("1980 Senate Hearings") (statement of Sen. Cranston). As the Court recently emphasized in protecting military retirement benefits from diversion by state community property laws, "in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs." *McCarty* v. *McCarty*, 453 U.S. 210, 236 (1981). The Court should similarly exercise restraint when considering veteran benefit legislation given its historical contribution to active military forces.

onstrate that the District Court erroneously applied that test in measuring the validity of the $10 fee limitation.[10] As DAV has just argued, the District Court failed to exhibit proper regard for the "strong presumption in favor of the validity of congressional action." *Schweicker* v. *McClure*, 456 U.S. 188, 200 (1982) (reversing District Court for holding that due process requires hearing officers on Medicare claims to be lawyers). This failure warrants particularly critical scrutiny of the District Court's application of the *Mathews* factors.[11]

[10] To the extent that this Court's summary affirmance in *Gendron* v. *Levi*, 423 U.S. 802 (1975), *aff'g Gendron* v. *Saxbe*, 389 F.Supp. 1303 (C.D. Cal.), was based upon the benefit-applicant status of the VA claimant-appellant there, the fact that certain individual appellees here are VA benefit recipients distinguishes *Gendron*. But to the extent that the affirmance was based on the *Gendron* District Court's determination that the $10 fee limitation satisfied due process, the decision calls for reversal of the District Court in this case.

[11] As a matter of either law or fact, this Court should make a final determination of appellees' claim despite the preliminary nature of the relief under review. As a matter of law — in this case, the District Court's failure, *inter alia*, to apply principles of judicial restraint — appeals courts ordinarily engage in plenary review of grants or denials of preliminary relief when the appeal is based upon an error of law. *See, e.g., Pratte* v. *N.L.R.B.*, 683 F.2d 1038, 1040 (7th Cir. 1982) ("when the availability of preliminary relief turns on interpretation of the law rather than the facts, the appellate court is free to review *de novo* the District Court's judgment."). As a matter of fact, the District Court purported to examine the due process adequacy of the fee limitation "as applied" to appellees. *NARS, supra*, 589 F.Supp. at 1309. But that characterization appears to have been no more than an attempt to distinguish the "great deal of evidence" marshalled in this case, *NARS* at 1310, from the "sparse," *id.*, record in *Gendron, supra* note 10, not an effort to confine the effect of the ruling herein to the appellees. As such, sound judicial administration should lead the Court to resolve this case finally rather than to require that the costs of further trial proceedings be borne for the comparatively small evidentiary gain that would be likely. *See, e.g., Triumph Hosiery Mills, Inc.* v. *Triumph International Corp.*, 308 F.2d 196, 200 (2d Cir. 1962) (court would not remand case following review of preliminary injunction in light of extensive record).

A. Preservation of the $10 Fee Limitation Would Foster the Psychological Value of Meaningful Communication of Veterans' Claims By and Through Similarly Situated Disabled Service Officers.

DAV does not disagree with the District Court's conclusion that "[m]any of the claimants and recipients are totally or primarily dependent upon [VA] benefits for their support." *NARS, supra*, 589 F.Supp. at 1314. Plainly the importance of such property interests as are at stake in many VA claims proceedings militates in favor of insuring that the $10 fee limitation does not deprive claimants of a fundamentally fair procedure.

But DAV believes that the District Court misconstrued the effect of "certain less direct interests" it found VA claimants also to possess. *Id.* at 1315. The trial court was sensitive to the "'psychological value to the veteran of personally communicating with bureaucracy'" before the veteran's claim is denied by the VA. *Id.* (quoting *Devine* v. *Cleland*, 616 F.2d 1080, 1088 (9th Cir. 1980)). Presumably, the District Court's view was that the $10 fee limitation operated as a barrier to full realization of that "psychological value," thus further undermining the statutes' constitutional validity.

In fact, however, the $10 fee limitation has itself indirectly served to foster that psychological value, rather than inhibit its realization, by contributing to the development of a dedicated corps of accredited representatives of recognized veterans' service organizations whose free assistance to VA claimants may be best illustrated by the NSOs who operate DAV's national service program. *See supra* pp. 2-3. As presented to the District Court:

> [A]ll DAV NSOs are wartime disabled veterans with service-connected, wartime disabilities. Like the clients they

represent, they have had to learn to face the handicaps that overshadowed their futures. Thus, they are able to relate to and understand the plight of the claimants they serve, not on the level of a cold business relationship, but on the personal level of individuals who have shared similar, painful and tragic experiences. Joeckel Decl., *supra* note 3, at ¶ 11.

It does not take a leap of faith to recognize that veterans' service organization representatives, and especially those possessing the characteristics of NSOs, supply to the veteran claimants whom they assist more than the substance of their skills, qualifications that DAV will address in the next section of argument. *See infra* pp. 17-21. These representatives also impart to claimants a sense that the personal conditions underlying their claims are fully appreciated and that these claims will be handled in the meaningful way that only one who shares a similar condition, produced by a similar experience, can assure. The fact that this assistance is rendered free of charge surely intensifies the claimants' perception of being well served.

The psychological consideration invoked by the District Court therefore works in favor of the $10 fee limitation, especially if invalidation of that provision would weaken the service officer system, as DAV will later argue would occur. *See infra* pp. 25-27. At the very least, it may be posited that those who would represent veterans for a profitable fee should appellees prevail would also, as a general rule, be less likely to convey the same measure of psychic satisfaction concerning meaningful communication. On balance, then, the "private interest that will be affected by the official action," *Mathews, supra*, 424 U.S. at 335, presents a factor of mixed influence in the due process analysis rather than one that unqualifiedly supports the judgment of the District Court.

B. The Extensive Training, Agency Familiarity, Organizational Expertise and Special Motivation of *Amicus Curiae's* National Service Officers, When Combined With the Nonadversarial Setting of VA Claims Administration, Minimize the Risk of Error Which Paid Attorney Involvement May Increase.

The principal reason for DAV's participation in this case, as stated earlier, *supra* p. 3, is that the Court's decision will necessarily raise an inference about the adequacy of DAV's most important nonprofit activity: the nationwide provision of free claims service through the NSO system. The inevitability of such an inference arises from the Court's necessary determination of whether the contribution of NSOs (and other service organization representatives) to the administration of VA claims, in conjunction with the nature of those proceedings, yields an "acceptable rate of error." *Califano* v. *Boles*, 443 U.S. 282, 283, 285 (1979) (recognizing the "special difficulties presented by the mass administration of the social security system," akin to the VA benefit system in which nearly five million claims were pending in one year, Jurisdictional Statement at 21 n.14). DAV submits that the current procedural structure of the VA benefit system more than satisfies that standard.

A useful starting point is the observation made by the Senate Veterans' Affairs Committee when it reported S. 349, a recent unsuccessful effort to alter the statutory scheme governing the adjudication of VA claims, *see supra* note 5:

> Many of the VA's internal procedures, particularly in the area of adjudication of claims, have developed over the years in such a way as *to afford to VA claimants some advantages not afforded to claimants before other agen-*

cies. Advantages most often cited are the VA's very liberal standards for the admission of evidence, and free representation before the VA by skilled officers of the various national veterans' service organizations — *advantages which are often credited for the informal, "nonadversarial" nature of VA proceedings. . . . [T]he Committee has given renewed attention and the utmost deference to these unique and desirable VA practices*. S. Rep. No. 97-466, 97th Cong., 2d Sess. 25 (1982) ("S. Rep. No. 97-466") (emphasis added).

Other participants in this case will describe these "desirable VA practices," including, by way of prominent example, the resolution of any reasonable doubt in favor of the claimant, 38 C.F.R. § 3.103(b), in more detail.[12] DAV would only conclude that the effect of veterans' service organization representatives like NSOs must thus be measured from a starting point at which the risk of erroneous deprivation of veterans' benefits is already substantially lower than it would be in the traditional adversary setting.

[12] The Government has described the VA benefit system principally by reference to VA regulatory provisions. Jurisdictional Statement at 3-8. Appellees assert that this description "departs dramatically from the record." Mot. to Aff., *supra* note 7, at 3. To the extent that the VA regulatory system as described by the Government satisfies constitutional requirements, as DAV submits it does, appellees' remedy is to attack not the constitutionality of statutes implemented by the regulations, but the VA's failure to follow its own regulations. To the extent that the VA's regulations implementing the statutory scheme are themselves viewed by the Court as falling short of constitutional requirements, a conclusion DAV would oppose, the Court should avoid unnecessary constitutional adjudication and declare that the VA improperly implemented the statutory scheme since the Court has been "willing to assume a congressional solicitude for fair procedure." *Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979) (reversing constitutional basis for requirement of a hearing by construing Social Security Act to require it).

The same Senate Committee quoted above later commented that "there is a strong and vital system of veterans service officers who provide *excellent representation* at no cost to claimants." S. Rep. No. 97-466, *supra*, at 50-51 (emphasis added). The Chairman of the House Veterans' Affairs Committee, discussing DAV specifically, had earlier and in another context noted that its NSOs are "*fully qualified* to assist veterans in all phases and in all matters pertaining to benefits for the disabled veteran." 119 Cong. Rec. 10622 (daily ed. April 2, 1973) (statement of Rep. Dorn) (emphasis added). These authoritative characterizations of service officer skills substantiate the view that in appropriate circumstances, as here, "due process may be satisfied by the provision of a qualified and independent adviser who is not a lawyer." *Vitek* v. *Jones*, 445 U.S. 480, 499 (1980) (Powell, J., concurring in part).

The applicability of that view to this case is fully justified by the qualifications of NSOs. These include (a) the completion of an extensive NSO training program supported by the VA, (b) the familiar relationship with the agency before which the NSOs appear, (c) the organizational expertise acquired from DAV in such subject areas as those giving rise to the complex claims of special concern to the District Court, and (d) the special motivation to assist the claimants they represent. All of the more than 250 NSOs employed by DAV, whose training and operations are funded by approximately $18 million annually, *see supra* p. 2 & note 2, share these qualifications.

The NSOs' qualifications derive in part from their participation in a comprehensive 16 month training program which the VA usually sponsors under chapter 31 of Title 38, U.S. Code, because of each NSO's disabled status. Joeckel Decl., *supra* note 3, at ¶ 7. This targeted program is designed to educate NSOs in all aspects of the VA's benefit programs, the laws and regulations governing the allocation of benefits and the procedures used by the VA in processing claims. *Id*. at ¶¶ 7 and 8

and Appendix G attached thereto ("App."). Of the more than 2600 hours of on-the-job training, for example, half is devoted to compensation claims alone. *Id.*, App. at G-1 and G-2. In addition, the DAV National Service and Legislative Headquarters in Washington, D.C. frequently conducts intensive continuing education seminars at which NSOs are updated with new materials and information. *Id.* at ¶ 9.

Another advantage attributable to DAV representation is that NSOs are highly familiar with VA personnel and have ready access to VA institutional resources. *Id.* at ¶ 10. The close relationship that NSOs have with the VA has developed as a result of the nonadversarial nature of the claims procedures described earlier and the VA's provision to recognized service organizations like DAV of office space in the VA, 38 U.S.C. § 3402, and full access to the records and libraries of the agency. 38 U.S.C. § 3301(d). NSOs are therefore accustomed to dealing with VA personnel on a regular and informal basis in the nearly 70 VA offices where they work. *See supra* p. 3. The practical advantages that NSOs thus possess in seeking to successfully shepherd claims through the VA system should not be underestimated.

The District Court concluded that NSOs lack the expertise to handle cases in which there are "substantive" and "procedural" complexities. *NAKS, supra*, 589 F.Supp. at 1322-1323. On the contrary, by virtue of the NSO training program and the access which NSOs have to both VA and DAV resources, the NSOs have accumulated substantial expertise in both the procedural workings of the VA claims process and the difficulties associated with the proof of complicated claims. Complex though the operation of the VA claims system may be, NSOs have been educated in the intricacies of this process and have become highly specialized as a result of their concentrated practice.

As to the substantive complexities involved in modern VA claims such as those relating to exposure to atomic radiation,

Agent Orange and Post Traumatic Stress Disorder ("PTSD"), *id.* at 1320, these are well understood by DAV and its NSOs. For example, the first Congressional hearing on the effect of veterans' exposure to atomic radiation was held in 1979. *Veterans' Claims for Disabilities for Nuclear Weapons Testing: Hearing Before the Senate Comm. on Veterans' Affairs*, 96th Cong., 1st Sess. (1979). DAV testified extensively at that hearing on the health effects of exposure to atomic radiation and urged legislation to provide relief to the claimants. *Id.* at 220 and 234-237 (statement of Charles E. Joeckel, Jr.).[13]

DAV enjoys a particularly distinguished record with respect to its activities concerning PTSD. As reported in *The Forgotten Warriors: New Concern for the Vietnam Vet.*, BEHAV. MED. 38, 40 (July, 1979), DAV funded the "Forgotten Warrior Project" — "the first comprehensive study of the psychological and social profile of Vietnam veterans." Springing from this study, DAV developed a nationwide outreach project operated by its own NSOs — "one of the first positive steps toward helping the Vietnam veteran." APA Monitor, April, 1979 (published by the American Psychological Association). DAV subsequently published its own book on the subject: POST-TRAUMATIC STRESS DISORDERS OF THE VIETNAM VETERAN: OBSERVATIONS AND RECOMMENDATIONS FOR THE PSYCHOLOGICAL TREATMENT OF THE VETERAN AND HIS FAMILY (T. Williams ed. 1980).[14]

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[13] Among other things, Mr. Joeckel stated that the VA "should develop guidelines" to grant assistance in this area. *Id.* at 220. After years of persistent DAV effort, last fall the Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) ("Exposure Standards Act of 1984"). Section 5(a)(1)(B) of the Act now requires the VA to "establish guidelines" to resolve claims concerning veterans' exposure to atomic radiation. 98 Stat. 2727.

[14] DAV's ground-breaking effort was the forerunner for the establishment of the VA's own "Vet Centers." *See generally, Readjustment Counseling: Hearing Before the Subcomm. on Hospitals and Health Care of the House Comm. on Veterans' Affairs*, 97th Cong., 1st Sess. 205 (1981) (statement of Robert H. Lenham, Special Projects Officer, DAV). This ultimately led to the recognition of PTSD as a psychological disorder by the American Psychiatric Association.

Finally, as it did with respect to radiation exposure, *see supra* note 13, DAV urged that "guidelines for the disposition of phenoxy herbicide related claims" be developed. *Veterans' Exposure to Agent Orange: Hearings Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 539 (1983) (statement of Stephen L. Edmiston, Associate Deputy National Legislative Director, DAV). Section 5(a)(1)(A) of the Exposure Standards Act of 1984, *supra* note 13, now requires the VA to "establish guidelines" for this purpose. 98 Stat. 2727.[15]

The disabled status of NSOs was previously described as helping to foster the psychological value of a veteran's sense that his/her claim was personally communicated. *See supra* pp. 13-14. On the other side of that psychological equation is the special motivation of a wartime disabled veteran to help someone similarly situated. The unique bonding that such a shared experience makes possible needs no elucidation for its force to be conveyed. When it is combined with the extensive train-

See American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980). Mental disorders providing a basis for VA benefits must be diagnosed in accordance with this manual. 38 C.F.R. §§ 4.125 and 4.126.

[15] The District Court seems to have believed that attorneys could better "assist" claimants with respect to such complex claims. *NARS, supra*, 589, F.Supp. at 1322. DAV questions whether, assuming *arguendo* that NSOs' expertise in these areas does not offset the advantage of legal training, attorneys could fair any better in outcome. For example, in preliminarily approving the $180 million settlement of the Agent Orange litigation consolidated in the Eastern District of New York, the U.S. District Court noted that despite "five years of . . . extensive discovery," the most serious doubt about plaintiffs' case remained whether "present scientific knowledge would support a finding of causality." *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, slip op. at 7 and 96 (E.D.N.Y. Sept. 25, 1984). The court suggested the possibility of a directed verdict for defendants, but even if a jury were permitted to find a causal link between Agent Orange exposure and plaintiffs' diseases, the court was dubious whether the verdict would survive a motion for judgment n.o.v. *Id.* at 118 and 130. On January 7, 1985, the Court issued its final judgment approving the settlement and awarding approximately $10 million in legal fees. *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, slip op. (E.D.N.Y. Jan. 7, 1985). If the quantum of attorney effort in that case yielded so little in the way of proving the Vietnam veterans' claims, it seems legitimate to ask how much better than NSOs attorneys would fair with this and similar "complex" claims before the VA.

ing, agency familiarity and organizational expertise upon which NSOs can draw in the nonadversarial setting of the VA claims process, the risk that a claimant will be erroneously deprived of benefits is more than acceptably minimized for constitutional purposes.

Whatever risk does remain, DAV maintains that representation of veterans by private counsel would not significantly improve claimants' prospects. In a variety of contexts, this Court has found that representation by an attorney does not substantially reduce the risk of erroneous deprivation of a liberty or property interest. *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 33 (1981); *Vitek, supra*, 445 U.S. at 499-500 (Powell, J., concurring in part); *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974). *Cf. Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972). Moreover, the Court has been particularly reluctant to require counsel under the mandate of due process in situations such as obtain under the VA claims system, "where the prescribed procedure involved informal decision-making without the trappings of an adversarial trial-type proceeding," *Lassiter, supra*, 452 U.S. at 37 (Blackmun, J., dissenting). *See Goss* v. *Lopez*, 419 U.S. 565, 583 (1975); *Gagnon* v. *Scarpelli*, 411 U.S. 778, 785-789 (1973). *Cf. Parham* v. *J.R.*, 442 U.S. 584, 604-609 (1979); *Wolff, supra*, 418 U.S. at 569-570. The need for counsel to insure a just result is primarily based upon the operation of an adversarial system in which an "equal contest of opposed interests" is the model. *Lassiter, supra*, 452 U.S. at 28. Outside such a system, attorneys have significantly less value, *see Gagnon, supra*, 411 U.S. at 789, and assistance in conformity with due process may be supplied in the form of a "qualified and independent adviser who is not a lawyer." *Vitek, supra*, 445 U.S. at 499 (Powell, J., concurring in part). *Cf. Wolff, supra*, 418 U.S. at 570.

That attorneys are less likely to reduce the risk of an erroneous decision in a nonadversarial setting, particularly given the

availability of NSOs, is indicated by available statistics from the VA's Board of Veterans Appeals ("BVA"). During fiscal years 1979 through 1982, the average allowance rate in BVA cases in which an NSO represented a veteran claimant was 13.3%, while the average allowance rate in cases in which a private attorney represented a claimant was 13.2%. Joeckel Decl., *supra* note 3, at ¶ 13. These statistics suggest that representation by private attorneys is no more effective than that of NSOs. Although paid attorneys might arguably fare better, the statistics also fail to reflect the fact that private attorneys, paid or not, are able to select their cases. By contrast, NSOs are obligated to represent all veterans who request representation, 38 C.F.R. § 14.628(d)(4), including those whose claims would have insufficient merit to induce an attorney to become involved.

The District Court found these statistics to be "not helpful." *NARS, supra,* 589 F.Supp. at 1317. It relied instead upon statistics which compared the effectiveness of NSOs to private attorneys in discharge-upgrade proceedings. These statistics are particularly unreliable since discharge-upgrade proceedings are formally adjudicated within the Department of Defense and are ultimately subject to judicial review, making them fundamentally different from VA claims proceedings.[16] DAV does not mean to suggest that NSOs and lawyers stand on an equal footing in adversarial proceedings outside the VA.

Ironically, it is conceivable that an influx of attorneys into the VA claims process could work to the overall detriment of claimants. Apart from the probability that attorneys would seek to limit their caseload primarily to meritorious claims as to which NSOs would just as likely prevail, the predictable result of substantial attorney participation in VA claims proceedings would be to make those proceedings more formal and

[16] Adverse upgrade decisions are administratively reviewable by the armed forces' Boards for Correction of Military Records, from which the normal appeal would lie in the U.S. Claims Court. *See generally*, 10 U.S.C. §§ 1551 *et seq*.

adversarial. *See Goss, supra,* 419 U.S. at 583 (1975); *Wolff, supra,* 418 U.S. at 569-570 (1974); *Gagnon, supra,* 411 U.S. at 787-788 (1973). As Justice Powell noted in *Vitek, supra*: "'The introduction of counsel into a revocation proceeding [would] alter significantly the nature of the proceeding' . . . because the hearing would inevitably become more adversary." 445 U.S. at 498 (Powell, J., concurring in part) (quoting *Gagnon, supra,* 441 U.S. at 787). Non-lawyers would be less prepared to represent claimants in a more adversarial and formal context, and because of the larger numbers of veterans they would likely represent, any comparatively lower margin of allowed claims that non-lawyers would thus experience could well exceed whatever increased margin attorneys might produce.

In sum, not only does the "excellent representation," S. Rep. 97-466, *supra* at 50-51, provided by veterans service officers like NSOs substantially minimize the risk of error in the nonadversarial setting of the VA claims process, but the added participation of paid attorneys in that process could operate to increase that risk for veteran claimants as a whole. The Constitution should not be read to reject the former in favor of the latter.

C. The Non-Financial Government Interests of Preventing the Diversion of Veterans' Benefits, Maintaining Nonadversarial Proceedings Involving Veterans, and Preserving Veterans' Organizations' Full Capacity to Represent Claimants and Assist the Congress, Warrant Upholding the $10 Fee Limitation.

The District Court commented that "the government has asserted little or no cognizable interest in maintaining the $10.00 fee restriction." *NARS, supra,* 589 F.Supp. at 1323. Thus the trial court dispensed with the final *Mathews* factor in one paragraph of a twenty-seven page opinion. While appellants are best able to articulate the substantial financial costs

to the Government if the current VA benefit system were altered as appellees desire, DAV would offer its views on non-financial costs since the former "are not of controlling weight in determining whether due process requires a particular procedural safeguard." *Mathews, supra,* 424 U.S. at 348.

An uncontested purpose of the fee limitation is to prevent diversion of VA benefits from veterans to attorneys and others. The District Court described the purpose as "paternalistic." *NARS, supra,* 589 F. Supp. at 1323. But even the Senate Committee that sought in 1982 to revise the fee limit stated that "continuing to discourage attorney representation . . . would, the Committee believes, *appropriately* serve to protect claimants benefits. . . ." S. Rep. 97-466, *supra* at 50 (emphasis added). In viewing the country's "long standing policy" of favoring veterans, this Court affirmed that it has "always been deemed to be legitimate." *Regan, supra,* 461 U.S. at 551 (quoting *Feeney, supra,* 442 U.S. at 279 n.25).[17]

Furthermore, as suggested by the Senate Committee's "utmost deference" to the "'nonadversarial' nature of VA proceedings," *see supra* p. 16, the creation of a more adversarial context for claimants by the introduction of attorneys would be particularly unseemly in light of the "moral obligation and debt of gratitude" owed to veterans. *Mitchell, supra,* 333 U.S. at 420. This Court has frequently recognized the government's

[17] The continuing legitimacy of guarding against unnecessary legal expenses was evidenced on January 7, 1985, when the court rejected an attorney's fee claim in the Agent Orange litigation," *supra* note 15, "requesting $2,500.00 . . . for doing nothing more than submitting a claim form — a task accomplished by tens of thousands of claimants without a lawyer's intervention." *In Re "Agent Orange" Product Liability Litigation*, MDL No. 381, slip op. at 55 (E.D.N.Y. Jan. 7, 1985). More broadly, the well-recognized litigious nature of modern society could lead veterans mistakenly to believe that attorneys are necessary to secure VA benefits in the event that their fees are constitutionally made payable. *See generally*, Barton, *Behind The Legal Explosion*, 27 STAN. L. REV. 567 (1975).

non-financial interest in preserving the nonadversarial nature of proceedings in a variety of settings. *See Parham, supra,* 442 U.S. at 605; *Goss, supra,* 419 U.S. at 583; *Wolff, supra,* 418 U.S. at 570.

An additional non-financial consideration in maintaining the current method of allocating veterans' benefits involves the Government's interest in maintaining the integrity and viability of veterans' organizations. In addition to the service programs which they operate, these groups provide vital assistance to the Congress in fulfilling its legislative, informing and oversight functions:[18]

> Those of us who have served on this Committee a number of years are well aware of *the excellent work of your organization of disabled veterans in support of fair and just compensation for service-connected disabilities*. . . . As in prior years, we will carefully review, consider and act upon the observations and recommendations of the Disabled American Veterans. 1980 Senate Hearings, *supra* note 9, at 44-45 (statement of Sen. Stafford) (emphasis added).

The nature of DAV's legislative activities with respect to VA compensation for disabilities underlying certain complex claims of concern to the District Court was suggested earlier. *See supra* notes 13-15 and accompanying text.

[18] As the Chairman of the Senate Veterans' Affairs Committee stated concerning recommendations made by such groups on VA authorizations and appropriations for fiscal year 1982:

> These annual presentations give us on the Committee an excellent opportunity for members to become more familiar with the views of the membership of veterans' organizations on the legislative needs relating to veterans. These sessions assist the committee in planning its priorities for the year. *FY82 Legislative Recommendations of Veterans' Organizations: Hearings Before the Senate Comm. on Veterans' Affairs,* 97th Cong., 2d Sess. 60 (1982) (statement of Sen. Simpson).

Two important aspects of veterans' groups like DAV that could be injured by a decision against the Government in this case are their service programs specifically and their reputations generally. It takes little vision to imagine that legal entrepreneurs would find NSOs to be as skilled as described above and would seek to lure them away from DAV to use them in a paralegal-type capacity in order to maximize profits. In addition, reputational damage from such a decision would be unavoidable, as mentioned above. *See supra* pp. 3 and 15.

One principal consequence of these injuries would directly conflict with the Senate Committee's expressed wish "not to disrupt unnecessarily the very effective network of non-attorney resources" that currently exists. S. Rep. No. 97-466, *supra*, at 49-50. Loss of NSO personnel — without replacements likely because even the youngest wartime disabled veterans are now established in careers — would be accompanied by lowered morale and a more adversarial VA that together would significantly weaken the NSO system. This consequence would in turn undermine the credibility of DAV's presentations to the Congress which, when combined with predictably adverse reactions from actual and potential DAV members and donors, would reduce the considerable value of the assistance that DAV currently renders the Legislative Branch.

So weakened, DAV would be correspondingly less able to provide the fraternal benefit to the veteran community intended by Congress when it included in DAV's charter the purpose of "stimulat[ing] a feeling of mutual devotion, helpfulness, and comradeship among all wounded, injured and disabled veterans." 36 U.S.C. § 90c. As Congress itself has thus indicated, to harm veterans' service organizations is to harm the nation's individual veterans as well. For those many veterans who would continue to desire the free assistance of the service organizations even if the fee limit were lifted, their choice would be restricted

by the opportunity made available to others to retain paid counsel. This significant interest of the veterans whom Congress has determined to benefit should not be subjected to such a delicate policy trade-off under the limitations of constitutional decision-making.

By ignoring the foregoing non-financial government interests, the District Court assigned too little weight to this *Mathews* factor, just as it assigned too much weight to the private interests and risk of error involved in the current VA claims system. Proper adjustment of the resulting imbalance will yield the conclusion that the $10 fee limitation does not violate appellees' rights to due process of law.[19]

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[19] As to appellees' First Amendment claim, DAV's due process analysis "demonstrates that [appellees' petition] rights under the First Amendment have been fully satisfied." *Ortwein* v. *Schwab*, 410 U.S. 656, 660 n.5 (1973). The District Court's conclusion that appellees sought attorneys to "obtain . . . compensation rather than . . . make a political statement," *NARS*, *supra*, 589 F.Supp. at 1326, subjects the individual appellees' interests in contracting with attorneys to economic regulation outside First Amendment associational protection. *In Re Primus*, 436 U.S. 412, 438 n.32 (1978). Finally, the fact that the $10 fee limitation "indirectly cripples" the organizational appellees' fundraising, *NARS*, *supra* at 1324, does not indicate an infringement of their First Amendment associational rights, but merely that their viability should not depend so vitally on receiving money from veteran claimants.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.[20]

Respectfully submitted,

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No. 84-571

(5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

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QUESTION PRESENTED

Whether 38 U.S.C. 3404, which prohibits the payment of a fee of more than $10 by a veteran to an agent or attorney in connection with an administrative claim for veterans' benefits, violates the First or Fifth Amendments.

PARTIES TO THE PROCEEDING

In addition to appellant Walters, the defendants named in the district court were the United States, the Veterans' Administration, and Paul D. Ising, the Director of the VA Regional Office in San Francisco.

In addition to appellee National Association of Radiation Survivors, plaintiffs in the district court were Swords to Plowshares Veterans Rights Organization, Don E. Cordray, Albert R. Maxwell, Reason F. Warehime, and Doris J. Wilson. The American G.I. Forum also intervened as a plaintiff.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	2
Summary of argument	14
Argument:	
The district court erred in invalidating the fee limitation in 38 U.S.C. 3404(c)	17
I. The district court's holding of unconstitutionality is subject to review in this Court for legal error..	20
II. Section 3404(c), as an integral part of the informal and nonadversarial veterans' benefit system established by Congress, does not violate procedural due process	24
A. Procedural due process is satisfied by a fundamentally fair procedure that affords a meaningful opportunity to be heard	24
B. In light of the informal and nonadversarial claims system in which service organizations provide effective assistance to veterans without charge, Section 3404(c) does not deny claimants a fundamentally fair procedure	26
C. Congress has determined that the VA claims system operates in a fair and nonadversarial manner, and the district court improperly failed to defer to that congressional determination	33
D. The wisdom of the fee limitation policy is for Congress to decide	43
III. Section 3404(c) does not violate a First Amendment right to meaningful and effective access to the VA process	46
Conclusion	50

TABLE OF AUTHORITIES

Cases: Page

"Agent Orange" Product Liability Litigation, In re, MDL No. 381 (E.D.N.Y. filed Feb. 23, 1979) .. 33
Alligator Co. v. *LaChemise Lacoste*, cert. denied, 421 U.S. 937 23
Armstrong v. *Manzo*, 380 U.S. 545 24
Arnett v. *Kennedy*, 416 U.S. 134 ..... 32, 37
Baldrige v. *Shapiro*, 455 U.S. 345 ..... 18, 46
BankAmerica Corp. v. *United States*, No. 81-1487 (June 8, 1983) 18
Bates v. *Arizona Bar*, 433 U.S. 350 47
Baxter v. *Palmigiano*, 425 U.S. 308 ..... 26, 29, 30
Bell v. *Sellevold*, 713 F.2d 1396, cert. denied, No. 83-852 (Jan. 16, 1984) 21
Bell v. *Wolfish*, 441 U.S. 520 44
Block v. *Hirsh*, 256 U.S. 135 37
Bodey v. *United States*, 495 F.2d 1370, cert. denied, 419 U.S. 899 18
Branzburg v. *Hayes*, 408 U.S. 665 36
Brotherhood of Railway Trainmen v. *Virginia Bar*, 377 U.S. 1 ..... 47, 49
Brown v. *Chote*, 411 U.S. 452 22
Buffalo Courier-Express v. *Buffalo Evening News, Inc.*, 601 F.2d 48 ..... 21, 22
Calhoun v. *Massie*, 253 U.S. 170 ..... 18, 32
Califano v. *Yamasaki*, 442 U.S. 682 24
Capital Trust Co. v. *Calhoun*, 250 U.S. 208 18
City of Akron v. *Akron Center for Reproductive Health, Inc.*, No. 81-746 (June 15, 1983) 36
Columbia Broadcasting System, Inc. v. *Democratic National Comm.*, 412 U.S. 94 37
Communist Party v. *Subversive Activities Control Board*, 367 U.S. 1 ..... 35, 37
CSC v. *Letter Carriers*, 413 U.S. 548 ..... 35, 37
Dana v. *Dana*, 250 U.S. 220 18
Deckert v. *Independence Shares Corp.*, 311 U.S. 282 23
Delaware & H. Ry. v. *United Transportation Union*, 450 F.2d 603, cert. denied, 403 U.S. 911 .. 21
Demarest v. *United States*, 718 F.2d 964, cert. denied, No. 83-1176 (Apr. 23, 1984) 11, 13, 18, 46

Cases—Continued: Page

Descamp's Estate, In re, 405 Pa. 331, 175 A.2d 827 18
Eastland v. *United States Servicemen's Fund*, 421 U.S. 491 36
Energy Action Educational Foundation v. *Andrus*, 654 F.2d 735, rev'd *sub nom. Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 23
FCC v. *Pottsville Broadcasting Co.*, 309 U.S. 134 .. 24, 44
Firemen v. *Chicago, R.I. & P.R. R.*, 393 U.S. 129 .. 35
Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 17
Frisbie v. *United States*, 157 U.S. 160 18
FTC v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 23
Fullilove v. *Klutznick*, 448 U.S. 448 37
Gagnon v. *Scarpelli*, 411 U.S. 778 ..... 25, 26, 28, 30
Gendron v. *Saxbe*, 389 F. Supp. 1303, aff'd *sub nom. Gendron* v. *Levi*, 423 U.S. 802 .... 11, 13, 17, 18, 30, 31, 38, 46
Goss v. *Lopez*, 419 U.S. 565 ..... 25, 26
Gostovich v. *Valore*, 153 F. Supp. 826, appeal dismissed, 355 U.S. 608, aff'd, 257 F.2d 144, cert. denied, 359 U.S. 916 18
Guardianship of Copsey's Estate, In re, 10 Cal. 2d 748, 76 P.2d 691, cert. denied, 304 U.S. 574 18
Harris v. *McRae*, 448 U.S. 297 44
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 44
Hines v. *Lowrey*, 305 U.S. 85 ..... 3, 17, 18
Hodel v. *Indiana*, 452 U.S. 314 43
Hoffmaster v. *Veterans Administration*, 315 F. Supp. 62, aff'd, 444 F.2d 192 ..... 18, 47
Holley v. *United States*, 352 F. Supp. 175, aff'd, 477 F.2d 600, cert. denied, 414 U.S. 1023 18
Houchins v. *KQED*, 429 U.S. 1341 21
Hurtado v. *United States*, 410 U.S. 578 ..... 18, 44
INS v. *Chadha*, No. 80-1832 (June 23, 1983) 17
James v. *Strange*, 407 U.S. 128 44
Johnson v. *Robison*, 415 U.S. 361 ..... 8, 27, 28
Jones & Laughlin Steel Corp. v. *Pfeifer*, No. 82-131 (June 15, 1983) 36
Katzenbach v. *McClung*, 379 U.S. 294 37

Cases—Continued: Page

Kleppe v. *New Mexico*, 426 U.S. 529 35
Landon v. *Plasencia*, 459 U.S. 21 25
Lassiter v. *Department of Social Services*, 452 U.S. 18 ..... 24, 25, 26, 28, 44
Legal Tender Cases, 79 U.S. (12 Wall.) 457 17
Londoner v. *Denver*, 210 U.S. 373 25
Ludecke v. *Watkins*, 335 U.S. 160 18
Lynch v. *United States*, 292 U.S. 571 32
Mackey v. *Montrym*, 443 U.S. 1 33
Margolin v. *United States*, 269 U.S. 93 18
Marsh v. *Chambers*, No. 82-83 (July 5, 1983) 18
Mathews v. *Eldridge*, 424 U.S. 319 ..... 24, 25, 30, 36, 37
Memphis Light, Gas & Water Div. v. *Craft*, 436 U.S. 1 25
Middendorf v. *Henry*, 425 U.S. 25 ..... 26, 28, 30, 37
Minnesota Bd. for Community Colleges v. *Knight*, No. 82-898 (Feb. 21, 1984) 47, 48
Missouri, Kansas & Texas Ry. v. *May*, 194 U.S. 267 25
Monroe v. *Standard Oil Co.*, 452 U.S. 549 27
Morris v. *Slappy*, 461 U.S. 1 47-48
Morrissey v. *Brewer*, 408 U.S. 471 24
Myers v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 ..... 21, 22
NAACP v. *Button*, 371 U.S. 415 47
Newman v. *Moyers*, 253 U.S. 182 18
Oregon v. *Mitchell*, 400 U.S. 112 ..... 36, 37
Parham v. *J.R.*, 442 U.S. 584 ..... 24, 25, 26, 30, 33
Personnel Administrator v. *Feeney*, 442 U.S. 256 27
Primus, In re, 436 U.S. 412 47
Radice v. *New York*, 264 U.S. 292 35
Rast v. *Van Deman & Lewis Co.*, 240 U.S. 342 35
Regan v. *Taxation With Representation*, 461 U.S. 540 27
Regan v. *Time, Inc.*, No. 82-729 (July 3, 1984) 44
Rennie v. *Klein*, 653 F.2d 836, vacated, 458 U.S. 1119, on remand, 720 F.2d 266 ..... 21, 22, 23
Richardson v. *Perales*, 402 U.S. 389 ..... 28, 30
Roberts v. *United States Jaycees*, No. 83-724 (July 3, 1984) 47

Cases—Continued: Page

Roland Machinery Co. v. *Dresser Industries, Inc.*, No. 84-1509 (7th Cir. ~~Aug. 31,~~ 1984) 21, 22
Romero v. *International Terminal Operating Co.*, 358 U.S. 354 18
Rostker v. *Goldberg*, 453 U.S. 57 ..... 35, 36, 37
Ruckelshaus v. *Monsanto Co.*, No. 83-196 (June 26, 1984) 35
Santosky v. *Kramer*, 455 U.S. 745 ..... 24, 28
Schall v. *Martin*, No. 82-1248 (June 4, 1984) 44
Schweiker v. *McClure*, 456 U.S. 188 26
Smith v. *Arkansas State Highway Employees*, 441 U.S. 463 48
Smith v. *Vulcan Iron Works*, 165 U.S. 518 23
Staub v. *Johnson*, 519 F.2d 298 ..... 32, 38
Staub v. *Roudebush*, 424 F. Supp. 1346, vacated, 574 F.2d 637 ..... 18, 47
Stencel Aero Engineering Corp. v. *United States*, 431 U.S. 666 27
Texaco, Inc. v. *Short*, 454 U.S. 516 36
United Mine Workers v. *Illinois Bar Ass'n*, 389 U.S. 217 ..... 47, 48
United States v. *Fairchilds*, 25 F. Cas. 1035 ..... 18, 31
United States v. *Gouveia*, No. 83-128 (May 29, 1984) 26
United States v. *Hall*, 98 U.S. 343 ..... 18, 31
United States v. *Leon*, No. 82-1771 (July 5, 1984) 36
United States v. *Lorenzetti*, No. 83-838 (May 29, 1984) 43
United States v. *Marks*, 26 F. Cas. 1162 ..... 18, 31
United States v. *National Dairy Products Corp.*, 372 U.S. 29 17
United States v. *Oregon*, 366 U.S. 643 27
United States Railroad Retirement Board v. *Fritz*, 449 U.S. 166 37
United Transportation Union v. *Michigan Bar*, 401 U.S. 576 ..... 47, 48
University of Texas v. *Camenisch*, 451 U.S. 390 ..... 22, 23
Vance v. *Bradley*, 440 U.S. 93 ..... 35, 44
Vitek v. *Jones*, 445 U.S. 480 ..... 26, 29, 30
Whalen v. *Roe*, 429 U.S. 589 ..... 25, 37
Withrow v. *Larkin*, 421 U.S. 35 20-21

Cases—Continued: Page

Wolff v. *McDonnell*, 418 U.S. 539 ..... 26, 28, 29, 30
Wright v. *Rushen*, 642 F.2d 1129 ..... 21, 22
Yeiser v. *Dysart*, 267 U.S. 540 18

Constitution, statutes and regulations:

U.S. Const.:
Amend. I ..... *passim*
Amend. V (Due Process Clause) 3, 11, 13, 16, 24, 30, 46
Act of Sept. 29, 1789, ch. 24, 1 Stat. 95 31
Act of Mar. 23, 1972, ch. 12, 1 Stat. 245 31
Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 *et seq.* 44
§ 2, 98 Stat. 2725 34
§ 3, 98 Stat. 2727 ..... 34, 45
Pub. L. No. 98-543, 98 Stat. 2735-2737 4
31 U.S.C. 3721(i) 18
38 U.S.C. 211(a) 3, 8, 28
38 U.S.C. 301 *et seq.* 2
38 U.S.C. 301-1000 27
38 U.S.C. 310 4
38 U.S.C. 311-313 4
38 U.S.C. 314 4
38 U.S.C. 315 4
38 U.S.C. 331 4
38 U.S.C. 332 4
38 U.S.C. 333 4
38 U.S.C. 334 4
38 U.S.C. 335 4
38 U.S.C. 337 4
38 U.S.C. 353 4
38 U.S.C. 401-417 3
38 U.S.C. 411 4
38 U.S.C. 413 4
38 U.S.C. 415 4
38 U.S.C. 784(a) 3
38 U.S.C. 784(g) 3
38 U.S.C. 1500-2021 27
38 U.S.C. 3401 9

Constitution, statutes and regulations—Continued: Page

38 U.S.C. 3402(a)(1) 9
38 U.S.C. 3402(a)(2) 9
38 U.S.C. 3402(b)(1) 9
38 U.S.C. 3404 ..... 3, 11
38 U.S.C. 3404(a) 9
38 U.S.C. 3404(b) 9
38 U.S.C. 3404(c) ..... *passim*
38 U.S.C. 3405 ..... 2, 3, 11, 14
38 U.S.C. 4001 7
38 U.S.C. 4004 7
38 U.S.C. 4004(a) 8
38 U.S.C. 4005(a) 6
38 U.S.C. 4005(b)(1) 6
38 U.S.C. 4005(d)(1) 7
42 U.S.C. 406 18
38 C.F.R. Pt. 3:
Section 3.102 5
Section 3.103(a) 5
Section 3.103(b) 5
Section 3.103(c) 6
Section 3.103(d) 8
Section 3.103(e) 6, 7
Section 3.104 8
Section 3.105 8
Section 3.109(a) 5
Section 3.150(a) 4
Section 3.150(b) 4
Section 3.151 4
Section 3.152 4
Section 3.155(a) 5
Section 3.156 8
Section 3.303-3.309 4
Section 3.312 3
38 C.F.R. Pt. 14:
Section 14.626 9
Section 14.626-14.637 9
Section 14.628(d)(4) 9
Section 14.628(d)(5) 9

Constitution, statutes and regulations—Continued: Page

Section 14.628(e)(4) 9
Section 14.628(e)(5) 9
Section 14.634(b) 3

38 C.F.R. Pt. 19:

Section 19.1 7
Section 19.1(a) 8
Section 19.2 7
Section 19.104 8
Section 19.112(a) 8
Section 19.114 6
Section 19.117 6
Section 19.118 6
Section 19.119(a) 7
Section 19.119(b) 7
Section 19.120(a) 7
Section 19.121 7
Section 19.123 7
Section 19.129(a) 6
Section 19.129 (b) 7
Section 19.150 8
Section 19.150-19.156 9
Section 19.157(a) 8
Section 19.157(b) 8
Section 19.157(c) 8
Section 19.160 8
Section 19.164 8
Section 19. 180 8
Section 19.182 8
Section 19.185-19.190 8
Section 19.194 8

Miscellaneous:

Cong. Globe, 37th Cong., 2d Sess. (1862):

p. 2101 32
p. 2102 32
p. 3119 ..... 32, 45

Cong. Globe, 41st Cong., 2d Sess. (1870):

p. 1965 31-32
p. 1967 32
p. 4459 ..... 32, 45

Miscellaneous—Continued: Page

7 Cong. Rec. (1878):

p. 4840 ..... 32, 45
p. 4841 ..... 32, 45, 46

15 Cong. Rec. 3240 (1884) 32
22 Cong. Rec. 146 (1890) 32
22 Cong. Rec. (1891):

p. 2176 ..... 32, 45
p. 2177 32
p. 2178 32
p. 2179 46
p. 2180 32
p. 2185 ..... 32, 45
p. 2187 32
p. 2188 45

56 Cong. Rec. (1918):

p. 5221 32
p. 5222 32
p. 5223 ..... 32, 45
p. 5224 32
p. 5225 ..... 45, 46

65 Cong. Rec. (1924):

p. 7862 46
p. 11013 46

131 Cong. Rec.:

p. E6 (daily ed. Jan. 3, 1985) 38
p. H146-H147 (daily ed. Jan. 24, 1985) 38

Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 199 (1971) 35, 36
H.R. 313, 99th Cong., 1st Sess. (1985) 38
H.R. 585, 99th Cong., 1st Sess. (1985) 38
H.R. Rep. 471, 65th Cong., 2d Sess. (1918) 32
Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983) 4, 6, 42
Legal Fees: Hearings Before the Subcomm. on Representation of Citizens Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Pts. 1-2 (1973) 10, 17, 18, 29, 42

Miscellaneous—Continued: Page

S. Levitan & K. Cleary, *Old Wars Remain Unfinished* (1973) 27
7 *Moore's Federal Practice* (1984) 21, 22
Office of Information Management and Statistics, Veterans' Administration, *Disability Compensation Data* (IB70-84-3 May 1984) 4
Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stan. L. Rev. 905 (1975) .. 29
Report of U.S. Veterans' Advisory Commission: Hearing Before the House Comm. on Veterans' Affairs, 90th Cong., 2d Sess. (1968) 19
S. 364, 95th Cong., 1st Sess. (1977) 38
S. 330, 96th Cong., 1st Sess. (1979) 38, 39
S. 349, 97th Cong., 1st Sess. (1981) 38, 39
S. 636, 98th Cong., 1st Sess. (1983) 38, 39
S. Rep. 96-178, 96th Cong., 1st Sess. (1979) 39, 42
S. Rep. 97-466, 97th Cong., 2d Sess. (1982) 4, 10, 29, 39, 40, 41, 42
S. Rep. 98-130, 98th Cong., 1st Sess. (1983) 39
U.S. Veterans' Advisory Commission: Hearing Before the House Comm. on Veterans' Affairs, 90th Cong., 1st Sess. (1967) 19
VA Ann. Rep. (1983) 7, 8, 9, 27, 28
Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 Before the Senate Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983) 42, 43

In the Supreme Court of the United States

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v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. 1a-52a) is reported at 589 F. Supp. 1302.

JURISDICTION

The district court's preliminary injunction (J.S. App. 52a) was entered on June 12, 1984. The district court's order modifying the preliminary injunction on the government's motion for a stay pending appeal (J.S. App. 53a-59a) was entered on July 20, 1984. Notices of appeal to this Court from the June 12 and July 20 orders were filed, respectively, on June 20, 1984 (J.S. App. 60a), and August 20, 1984 (J.S. App. 61a). On August 10, 1984, Justice Rehnquist extended the time within which to docket this appeal to and including October 1, 1984, and on September 11, 1984, he further extended the time for docketing the appeal to and including Octo-

ber 8, 1984 (a federal holiday). The appeal was timely docketed on October 9, 1984, and the Court noted probable jurisdiction on December 10, 1984. The jurisdiction of this Court rests upon 28 U.S.C. 1252. See *McLucas* v. *DeChamplain*, 421 U.S. 21, 30-31 (1975); *Railway Labor Executives' Ass'n* v. *Gibbons*, 448 U.S. 1301, 1303-1304 & n.2 (Stevens, Circuit Justice), subsequent order, 448 U.S. 909 (1980).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 3404(c) provides:

> The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> (1) shall be determined and paid as prescribed by the Administrator;
>
> (2) shall not exceed $10 with respect to any one claim; and
>
> (3) shall be deducted from monetary benefits claimed and allowed.

38 U.S.C. 3405 provides:

> Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

STATEMENT

By statute, Congress has established an administrative system of service-connected death and disability benefits for veterans. See 38 U.S.C. 301 *et seq.* Since the time of the Civil War, Congress has limited the amount that

a veteran may pay to an agent or attorney for assistance and representation in connection with a claim for such benefits. As relevant here, 38 U.S.C. 3404(c) provides (subject to criminal penalties for receipt of greater sums, see 38 U.S.C. 3405) that "in allowed claims for monetary benefits under laws administered by the Veterans' Administration * * * [s]uch fees * * * shall not exceed $10 with respect to any one claim * * *."[1] Appellees contend that Section 3404(c) violates their Fifth Amendment right to procedural due process and their First Amendment rights of association and free speech and to petition for a redress of grievances.

1. At issue in this case are non-contractual benefits provided to veterans or their survivors for service-connected death or disability. These benefits are not based on financial need, or on length and type of service, or on negligence or other degree of fault; instead, they rest solely on the fact of a service-connected death or disability. In brief, dependency and indemnity compensation benefits are available to a veteran's surviving spouse, children, or dependent parents if the veteran dies as the result of injury or disease incurred in or aggravated by active military service (see 38 U.S.C. 401-417; 38 C.F.R. 3.312); monthly benefit rates are computed from the veteran's pay grade and range from $476 to $1305 for a surviv-

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[1] Section 3404 is applicable to fees in administrative proceedings. Judicial review of the decision of the Administrator on service-connected death and disability claims is expressly precluded by statute (see 38 U.S.C. 211(a); page 8, *infra*). In contrast, Congress has authorized suits on claims under certain veterans' insurance programs (see 38 U.S.C. 784(a)) and has allowed a fee not to exceed 10% of the amount recovered for representation in such suits (38 U.S.C. 784(g)). Contrary to the suggestion of appellees National Association of Radiation Survivors, et al., in their motion to affirm (NARS Mot. to Aff. App. 62a-63a, 66a-67a), the limitation in Section 3404 applies to the fees of an agent or attorney regardless of the nature of the work performed and is not confined to clerical tasks in preparing a claim. See *Hines* v. *Lowrey*, 305 U.S. 85, 89 (1938). However, Section 3404 does not bar reimbursement for expenses incurred in connection with a claim. See 38 C.F.R. 14.634(b).

ing spouse and from $240 for one child to $446 for three children (plus $90 for each additional child) where there is no surviving spouse (see 38 U.S.C. 411 and 413, as amended, Pub. L. No. 98-543, 98 Stat. 2735, 2736-2737).[2] Disability benefits are payable for partial or total disability that results either from an injury or disease occurring in active military service or from a pre-existing injury or disease aggravated in active military service (see 38 U.S.C. 310, 331); monthly benefit rates run from $66 for a 10% disability to $1,295 for a 100% disability, with additional compensation for certain severe disabilities and for dependents (see 38 U.S.C. 314, 315, 334, 335, as amended, Pub. L. No. 98-543, *supra*).[3] By statute and regulation, various presumptions are applicable in establishing that an injury or disease is service-connected. See 38 U.S.C. 311-313, 332, 333, 337, 353; 38 C.F.R. 3.303-3.309.

2. Claims for service-connected death and disability benefits are decided in an informal and nonadversary process.[4] The process is commenced by the submission of a claim for benefits (38 C.F.R. 3.151, 3.152). The necessary claims form is furnished by the Veterans' Administration either upon request or upon receipt of notice of death of a veteran (38 C.F.R. 3.150(a) and (b)). In

[2] Dependency and indemnity compensation benefits are payable only to those parents whose income does not exceed prescribed levels and who therefore are deemed to have been dependent on the veteran. See 38 U.S.C. 415. This is the sole consideration of financial need for beneficiaries in the service-connected death and disability program.

[3] Veterans' Administration statistics indicate that more than 80% of the veterans to whom disability benefits are paid receive a basic rate of $376 per month or less. See Office of Information Management and Statistics, Veterans' Administration, *Disability Compensation Data* 2 (IB70-84-3 May 1984).

[4] See generally S. Rep. 97-466, 97th Cong., 2d Sess. 86-87, 126-135 (1982); *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 178-200 (1983) [hereinafter *1983 House Hearings*].

addition, "[a]ny communication or action, indicating an intent to apply for one or more [veterans'] benefits * * *, may be considered an informal claim" and, "if a formal claim has not been filed, an application form will be forwarded to the claimant for execution" (38 C.F.R. 3.155(a)). In the event that "a claimant's application is incomplete, the claimant will be notified of the evidence necessary to complete the application" (38 C.F.R. 3.109(a)). No statute of limitations precludes a claimant from obtaining prospective benefits for a death or disability that occurred many years prior to the submission of an application.

A claim is initially reviewed by the so-called agency of original jurisdiction, which is usually the Regional Office of the Veterans' Administration that is most convenient to the claimant. These proceedings "are ex parte in nature" (38 C.F.R. 3.103(a)) and no government official appears in opposition to the claim. The VA has "the obligation * * * to assist a claimant in developing the facts pertinent to his claim" (*ibid.*), and "[a]ny evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records" (38 C.F.R. 3.103(b)).

The VA is also under an obligation "to render a decision which grants [the claimant] every benefit that can be supported in law while protecting the interests of the Government" (38 C.F.R. 3.103(a)), and "[i]t is the defined and consistently applied policy of the Veterans' Administration to administer the law under a broad interpretation * * *" (38 C.F.R. 3.102). Furthermore, "[w]hen, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant" (*ibid.*).

> Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from im-

> peachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records * * *.

Ibid.

A claimant is "entitled to a hearing at any time on any issue involved in a claim" (38 C.F.R. 3.103(c)). The purpose of the hearing is to permit the claimant to present any evidence or arguments that bear on the claim (*ibid.*). "It is the responsibility of the Veterans' Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position" (*ibid.*). Likewise, "questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony" (*ibid.*).

The claimant is notified of any decision on his claim, including "the reason for the decision," "the date it will be effectuated," and "the right to a hearing" (38 C.F.R. 3.103(e)). In the event of an adverse decision, the claimant is advised of his right to appeal and the applicable time limits for taking an appeal (*ibid.*; 38 C.F.R. 19.114). An appeal is initiated by filing a notice of disagreement (38 U.S.C. 4005(a); 38 C.F.R. 3.103(e), 19.118), which is "[a] written communication from a claimant or the representative expressing dissatisfaction or disagreement with * * * [the original] determination * * *. It need not be expressed in any special wording" (38 C.F.R. 19.117). A notice of disagreement may be filed at any time within one year of the initial decision (38 U.S.C. 4005(b)(1); 38 C.F.R. 19.129(a)).[5]

[5] An appeal is noticed in approximately 2.5% of the claims filed. See *1983 House Hearings* 44-45.

After a notice of disagreement is submitted, the agency of original jurisdiction may reconsider the claim (38 U.S.C. 4005(d)(1); 38 C.F.R. 19.119(a)).[6] If the decision remains adverse to the claimant, he is "entitle[d] * * * to a [s]tatement of the case for his assistance in perfecting his appeal" (38 C.F.R. 3.103(e); see also 38 C.F.R. 19.119(b)). "The statement of the case should provide the appellant notice of those facts and applicable laws and regulations upon which the agency of original jurisdiction based its determination of the issue or issues. It should be complete enough to allow the appellant to present written and/or oral arguments * * * [on appeal]" (38 C.F.R. 19.120(a)). In particular, a statement of the case is required to contain:

> (1) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement.
>
> (2) A summary of the applicable law and regulations, with appropriate citations.
>
> (3) The determination of the agency of original jurisdiction on each issue and the reasons for each such determination with respect to which disagreement has been expressed:

38 C.F.R. 19.129(b); see also 38 U.S.C. 4005(d)(1). Following receipt of the statement of the case, a claimant perfects his appeal by completing and submitting a form that is provided to him by the VA (see 38 C.F.R. 19.121, 19.123).

Appeals in claims for service-connected death and disability benefits are within the jurisdiction of the Board of Veterans' Appeals (BVA). See 38 U.S.C. 4001, 4004; 38 C.F.R. 19.1, 19.2. The Board undertakes de novo review of the claim; it "exercise[s] the same authority as

[6] Of the approximately 69,000 notices of disagreement that were filed in fiscal year 1983, nearly 29,000 were resolved by the field office; of these, almost 9000 were allowed. See VA Ann. Rep. 114 (1983).

the department having original jurisdictional responsibility" (38 C.F.R. 19.1(a)) and has "jurisdiction * * * [as] to all questions" (38 C.F.R. 19.112(a); see also 38 U.S.C. 4004(a)).

Upon request, a claimant is entitled to a hearing on appeal (38 C.F.R. 19.157(a)). Hearings are held either in Washington, D.C., or at VA facilities around the country (38 C.F.R. 19.160). "The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue" (38 C.F.R. 19.157(b)). Like the previous proceedings on the claim, hearings before the BVA "are ex parte in nature and nonadversary" (38 C.F.R. 19.157(c)); although parties are allowed to ask questions, there is no formal cross-examination or rebuttal of evidence, and the rules of evidence do not apply (*ibid.*). The claimant may also be given an opportunity to submit additional evidence following the hearing (38 C.F.R. 19.164).

Based on the record, the Board may allow the claim in whole or in part, deny or dismiss it, or remand for further development (38 C.F.R. 19.180, 19.182).[7] The decision of the BVA on service-connected death and disability claims is final (38 C.F.R. 19.104) and is not subject to judicial review. 38 U.S.C. 211(a); *Johnson* v. *Robison*, 415 U.S. 361 (1974).[8]

3. A claimant is entitled to representation at all stages of the administrative process (38 C.F.R. 3.103(d), 19.150). Such representation may be provided by a member of a recognized organization (as discussed below), an attorney or agent (subject to the fee limitation

[7] During fiscal year 1983, the BVA allowed more than 5200 appeals and remanded nearly 6000 other appeals for further proceedings; approximately 400 appeals were withdrawn, and 27,000 appeals were denied. See VA Ann. Rep. 114 (1983).

[8] Although the decision of the BVA is final, liberal provisions exist for reconsidering a BVA decision and for reopening a denied claim on the basis of new evidence. See 38 C.F.R. 19.185-19.190, 19.194; see also 38 C.F.R. 3.104, 3.105, 3.156.

at issue here), or other person authorized to represent claimants. The VA has prescribed eligibility standards for each of these categories of representatives (see 38 U.S.C. 3401, 3404(a) and (b); 38 C.F.R. 14.626-14.637, 19.150-19.156) to ensure that claimants "have qualified representation in the preparation, presentation, and prosecution of claims for veterans' benefits" (38 C.F.R. 14.626).[9]

Under 38 U.S.C. 3402(a)(1), Congress has authorized the VA to recognize individuals from certain veterans' and service organizations as representatives "in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration."[10] The VA may furnish space and office facilities for the use of paid full-time representatives of such organizations (38 U.S.C. 3402(a)(2)). Recognition may be given to national or state veterans' organizations and to other veterans' organizations that are primarily involved in delivering services to veterans and that, inter alia, will provide complete claims service and undertake affirmative action, such as training and monitoring of their representatives, to ensure proper handling of claims (38 C.F.R. 14.628(d)(4) and (5), 14.628(e)(4) and (5)). In addition, in order to be recognized, representatives from these organizations must certify that "no fee or compensation of any nature will be charged any individual for services rendered in connection with any claim" (38 U.S.C. 3402(b)(1)).

Pursuant to these provisions, there has developed "a strong and vital system of veterans service officers who

[9] In fiscal year 1983, approximately 86% of claimants were represented by service organizations and 2% by attorneys; in addition, 12% of claimants elected to represent themselves. See VA Ann. Rep. 115 (1983).

[10] The statute specifically enumerates the Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, and the Veterans of Foreign Wars. The Administrator may also recognize "such other organizations as he may approve" (38 U.S.C. 3402(a)(1)).

provide excellent representation at no cost to claimants." S. Rep. 97-466, 97th Cong., 2d Sess. 50-51 (1982).

> Most of the recognized veterans' organizations, and most of the States, work with claimants in the preparation, presentation, and prosecution of claims for benefits. These organizations maintain a staff of employees—well trained and experienced—who devote their full-time efforts to assisting veterans and other claimants on a strictly no-charge basis. These men and women are accredited as representatives of the organizations to the Veterans Administration and are accorded every permissible assistance by our personnel, including the right to inspect the individual veteran's claims folder under the authority of the veteran's power of attorney, filed with the VA. These representatives function not only at the Regional Offices and field stations but also here in Washington at the Central Office and before the Board of Veterans Appeals, both here and in the field.
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> * * * [T]here are presently over * * * 2,800 people [accredited as service representatives], the great majority of whom are full-time paid employees, fully familiar with every facet of veterans' laws and VA regulations, with a thorough knowledge of our procedures and precedents, and with a wealth of experience gained through years of advocacy in behalf of claimants.

Legal Fees: Hearings Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary, 93d Cong., 1st Sess., Pts. 1-2, at 457 (1973) (statement of VA General Counsel John J. Corcoran) [hereinafter *1973 Hearings*]; see also *id.* at 445-447. Appellees, dissatisfied with this system of representation, seek to retain private attorneys to pursue their benefit claims before the VA and thus challenge the validity of the fee restriction in 38 U.S.C. 3404(c).

4. This action was filed in the United States District Court for the Northern District of California in April 1983. Plaintiff-appellees are veterans' groups and individual veterans or their surviving spouses; no plaintiff class was requested or certified. Appellees alleged that the $10 fee limitation prevents veterans from retaining attorneys and that, in the absence of such representation, the administrative claims system is fundamentally unfair and denies veterans their Fifth Amendment right to procedural due process and their First Amendment rights of association and free speech and to petition for a redress of grievances. Following extensive discovery by appellees,[11] the district court concluded that appellees "have a high probability of success" on their constitutional arguments (J.S. App. 6a; see also *id.* at 40a, 41a, 47a, 48a) and entered a preliminary injunction against enforcement of 38 U.S.C. 3404 and 3405.[12]

With respect to the procedural due process issue, the district court recognized (J.S. App. 6a) that both this Court, summarily affirming the decision of a three-judge district court, and the Ninth Circuit had sustained the constitutionality of 38 U.S.C. 3404(c). *Gendron* v. *Levi*, 423 U.S. 802, aff'g *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975); *Demarest* v. *United States*, 718 F.2d 964 (1983), cert. denied, No. 83-1176 (Apr. 23, 1984). The court sought to distinguish these decisions, however, on the ground that they involved challenges to Section 3404 on its face and did not preclude an attack on the statute "as applied to the facts of this case" (J.S. App. 10a; see also *id.* at 7a n.7, 14a, 15a). The court remarked that "[i]t is particularly important to conduct a

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[11] As the district court recognized, appellees' discovery in this case was "extensive" (J.S. App. 12a) and involved "a great deal of evidence" (*ibid.*), including depositions of seven VA officials and interrogatories and requests for documents that led to the government's production of more than 25,000 pages of material. Appellees themselves acknowledge that they engaged in "six months of extensive discovery" (Br. in Opp. to Stay 1).

[12] The district court had previously denied the government's motion to dismiss the complaint, finding that appellees had stated a claim under both the Due Process Clause of the Fifth Amendment and the First Amendment. See J.A. 97-121.

careful inquiry into a statute's application to all the facts of the case at hand where that statute is being challenged as violative of procedural due process" (*id.* at 11a), and it noted (*id.* at 12a) that appellees

> have engaged in extensive discovery * * * [and] have gathered a great deal of evidence regarding the way the claims process functions and whether it tends to be adversarial, the extent to which VA employees or service organization representatives are able to aid veterans in gathering supporting materials and presenting their claims, the special difficulties posed by such complex claims as those relating to Agent Orange or radiation-related illnesses, the way in which the lack of an attorney renders veterans unable to present their claims adequately, and the financial hardship imposed on veterans by the $10.00 limit. They have also presented statistical evidence regarding the success rates of various types of * * * claims before the several levels of the VA.

Based on this evidence, the district court determined that, while the VA process was designed to be informal and nonadversarial (J.S. App. 32a-33a), "both the procedures and the substance entailed in presenting * * * claims to the VA are extremely complex" (*id.* at 30a) and "particularly so with respect to those claimants seeking to obtain benefits for deaths or disabilities arising from such causes as exposure to atomic radiation or Agent Orange, or from Post Traumatic Stress Syndrome" (*id.* at 32a). The court also concluded that, because of resource limitations, neither service organization personnel representing claimants nor VA employees are able to devote the same time and resources to a case that a retained attorney could (*id.* at 27a, 33a, 36a, 37a-38a). As the court explained (*id.* at 33a, 37a-38a (footnote omitted)):

> [N]either the VA officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to

> claimants. Even assuming that all VA personnel were prepared to do everything that they could to build claimants' cases for them, it is clear that the resources of the VA are insufficient to permit the substantial investment of time that would be necessary.
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> * * * * *
>
> [Appellees] do not deny that such [service] organizations provide substantial service, but argue simply that due to these organizations' limited resources, they are unable to provide the full array of services which a paid attorney might provide. * * * Given the very limited extent to which either the VA personnel or service organization representatives are able to assist veterans or their families in bringing service-related death and disability claims, the vast substantive and procedural complexities facing such claimants, and the important need of such claimants, the $10.00 fee limitation deprives plaintiffs of the ability to make a full presentation of their claim to the VA.

The district court also held that, independently of the Due Process Clause, the First Amendment entitles the individual appellees to "meaningful" (J.S. App. 45a) and "effective" (*ibid.*) access to the VA and protects the right of the organizational appellees to "provid[e] adequate legal services to their members" (*id.* at 40a). The court determined (*id.* at 47a) that appellees "have submitted vast numbers of depositions, declarations, and documents demonstrating that claimants' inability to employ counsel for a fee of more than $10.00 severely impedes their efforts to investigate and present their death and disability claims to the VA." Finding that *Gendron* and *Demarest* had not presented First Amendment challenges to Section 3404(c) (J.S. App. 40a-41a), the court concluded that appellees had "shown a high probability of success on their First Amendment claim" (*id.* at 48a).

Finally, the district court held that appellees had demonstrated that they would suffer irreparable injury if a preliminary injunction were denied and that the balance

of hardships between the parties was in their favor (J.S. App. 48a-51a). Accordingly, the district court entered a broad preliminary injunction against enforcement of Sections 5404(c) and 3405; that injunction is of nationwide scope, is not limited to the appellees in this case, is not confined to unusually complex or complicated cases, and is not otherwise restricted to instances in which the court believed that the claims procedure would be unfair or inadequate in the absence of a retained attorney.[13] In addition, the court required the VA to take various affirmative steps to remove references to the fee limitation in its forms and other documents and to post a summary of the preliminary injunction in VA offices across the country. J.S. App. 52a. On the government's motion for a stay pending appeal, the district court modified the injunction with regard to certain provisions concerning implementation, but in all other respects it denied a stay. *Id.* at 53a-59a.

On September 27, 1984, Justice Rehnquist granted the government's application for a stay of the district court's injunction pending direct appeal to this Court. On October 9, 1984, the Court denied appellees' motion to vacate that stay.

SUMMARY OF ARGUMENT

The district court has held unconstitutional a century-old federal statute that limits the fees that may be charged to represent a claimant for veterans' benefits. This statute has previously been sustained by both this Court and other courts. Moreover, Congress has repeatedly examined the fee limitation and, as recently as last session, has adhered to it. Nevertheless, the court below reviewed the operation of the VA claims system and invalidated the statute on the basis of its conclusion—contrary to the determination of Congress—that the system is adversarial in nature and that the VA and the veterans' service organizations do not provide adequate representation to claimants. In thus holding that the right to retain an attorney without regard to the statutory fee limit is necessary to a fundamentally fair administrative procedure, the district court followed an erroneous method of analysis and reached an incorrect result.

1. To begin with, the district court's preliminary injunction against enforcement of the fee limitation in 38 U.S.C. 3404(c) is utterly inappropriate to the procedural deficiencies it found in the claims system. As the statute and administrative regulations make plain, the VA process was established to be informal and nonadversarial. Insofar as there has been a deviation in practice from that approach, the proper remedy would be to require that the system be brought into compliance with its intended operation, not to set aside the fee limitation. The relief ordered by the district court ignores Congress's choice to create an informal and nonadversarial system and will alter the basic nature of the process in a way that further departs from the congressional design.

2. But more importantly, the district court's holding of unconstitutionality is erroneous. Because the district court's ruling is premised on an error of law, it is subject to plenary review in this Court.

a. Section 3404(c) does not deny veterans the fundamental fairness required by procedural due process. As this Court has held in many other situations, the presence of retained counsel is not necessary to a fair procedure. The fee limitation must be judged in the context of the informal and nonadversarial claims system for processing veterans' benefits, in which the VA is responsible for assisting veterans to establish their claims and service organizations are available to provide expert representation to veterans without charge. In addition, the fee limit ensures that veterans' benefits are not depleted through payments to counsel and that veterans are protected from overreaching and unscrupulous attorneys.

[13] Indeed, the district court's injunction applies to claims for every type of VA monetary benefit and is not limited to service-connected death and disability claims, which is all that appellees sought to challenge.

These considerations fully justify the fee limit. Accordingly, Congress's effort to establish an alternative dispute resolution mechanism in this area does not violate the Due Process Clause.

The district court's decision to the contrary derives from its conclusion, based on the record submitted by the parties in this litigation, that the VA claims system in fact does not operate in an informal and nonadversarial manner and that the service organizations do not provide adequate assistance to claimants. However, Congress has recently inquired into the nature and operation of the claims system and has determined that the system *is* informal and nonadversarial and that the service organizations *do* provide effective representation. The district court simply disregarded these legislative determinations and undertook to conduct a legislative-type hearing on the general workings of the VA process. In so doing, it ignored separation-of-powers principles and the special competence of Congress to analyze questions of legislative fact. By failing to accord substantial deference to the determinations of Congress, the district court misconceived the proper role of the judiciary and its relationship to the legislative branch of government.

Congress has given considerable attention to the fee limitation over the past 120 years, and that attention continues to the present. The objections that appellees raise to the soundness and desirability of the fee limit have been considered by, and continue to be considered by, Congress. Congress's choice among available alternatives, and the wisdom of its policy, are not matters for constitutional adjudication. In our democratic system of government, the reasonableness of Section 3404(c) must be left to the legislature, not resolved by the courts in the guise of procedural due process.

b. Nor does Section 3404(c) violate a First Amendment right of association and speech and to petition for a redress of grievances. Given that the VA claims process is fair and adequate without privately retained attorneys, the fee limitation does not interfere with any First Amendment right to effective and meaningful access to the agency. Likewise, the fee limit does not prevent veterans from engaging in collective activity, or veterans' organizations from furnishing a wide range of supporting services (including legal advice and representation), provided only that the claimant is not charged more than $10. Finally, this case plainly differs from those that the Court has previously considered, in which the assistance of counsel was clearly required in order adequately to pursue legal rights in a contested and adversary proceeding. Nothing in the First Amendment implies that the fee limit is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge.

ARGUMENT

THE DISTRICT COURT ERRED IN INVALIDATING THE FEE LIMITATION IN 38 U.S.C. 3404(c)

The present challenge to the constitutionality of 38 U.S.C. 3404(c) bears a heavy burden. This Court has long recognized that Acts of Congress are presumptively constitutional and will be upset only by a clear showing of invalidity.[14] Such a presumption is especially appropriate in this case. First, the predecessor of Section 3404(c) was enacted in 1862, and a strict limitation on fees for retained counsel has been in place since that time;[15] the longstanding history of the fee provision

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[14] See, *e.g.*, *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 23; *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32 (1963); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 531 (1870); *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 128 (1810).

[15] The history and development of the statutory fee limitation are traced in the appendix to our motion to affirm in *Gendron*, a copy of which has previously been sent to counsel for appellees. See also *Hines* v. *Lowrey*, 305 U.S. 85, 88-90 (1938); *1973 Hearings* 458-459, 500-501.

Congress and administrative agencies have adopted a number of other provisions limiting the fees that claimants in various gov-

provides a substantial refutation of the claim that the statute suffers from a latent and previously undiscovered defect.[16] Moreover, this Court, as well as lower courts, have—until the instant case—consistently rejected attacks on the constitutionality of the fee limitation, including attacks based on procedural due process grounds;[17] the absence of a successful challenge over the last century is telling evidence against the district court's novel holding. Finally, as we discuss in detail below (see pages 38-46, *infra*), Congress has repeatedly examined the fee limitation and, as recently as last session, has adhered

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ernment programs may pay to attorneys or agents. A compilation of these provisions is reprinted in *1973 Hearings* 566-570, 583-587; see also, *e.g.*, 31 U.S.C. 3721(i); 42 U.S.C. 406.

[16] See, *e.g.*, *Marsh* v. *Chambers*, No. 82-23 (July 5, 1983), slip op. 3, 6-7; *Ludecke* v. *Watkins*, 335 U.S. 160, 171 (1948); cf. *Bank-America Corp.* v. *United States*, No. 81-1487 (June 8, 1983), slip op. 9; *Baldrige* v. *Shapiro*, 455 U.S. 345, 361 (1982); *Hurtado* v. *United States*, 410 U.S. 578 (1973); *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 370-371 (1959).

[17] See *Gendron* v. *Levi*, *supra*; *Demarest* v. *United States*, *supra*. See also, *e.g.*, *Hines* v. *Lowrey*, *supra*; *Margolin* v. *United States*, 269 U.S. 93 (1925); *Frisbie* v. *United States*, 157 U.S. 160 (1895); *United States* v. *Hall*, 98 U.S. 343 (1878); *Bodey* v. *United States*, 495 F.2d 1370 (4th Cir.) (Table), cert. denied, 419 U.S. 899 (1974); *Hoffmaster* v. *Veterans Administration*, 444 F.2d 192 (3d Cir. 1971); *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio 1972), aff'd, 477 F.2d 600 (6th Cir.) (Table), cert. denied, 414 U.S. 1023 (1973); *Gostovich* v. *Valore*, 153 F. Supp. 826 (W.D. Pa. 1957), appeal dismissed, 355 U.S. 608 (1958), aff'd, 257 F.2d 144 (3d Cir. 1958), cert. denied, 359 U.S. 916 (1959); *United States* v. *Marks*, 26 F. Cas. 1162 (C.C.D. Ky. 1869) (No. 15,721); *Staub* v. *Roudebush*, 424 F. Supp. 1346 (D.D.C. 1976), vacated for lack of standing, 574 F.2d 637 (D.C. Cir. 1978) (Table); *United States* v. *Fairchilds*, 25 F. Cas. 1035 (W.D. Mich. 1867) (No. 15,067); *In re Guardianship of Copsey's Estate*, 10 Cal. 2d 748, 76 P.2d 691, cert. denied, 304 U.S. 574 (1938); *In re Descamp's Estate*, 405 Pa. 331, 175 A.2d 827 (1961); cf. *Yeiser* v. *Dysart*, 267 U.S. 540 (1925); *Newman* v. *Moyers*, 253 U.S. 182 (1920); *Calhoun* v. *Massie*, 253 U.S. 170 (1920); *Dana* v. *Dana*, 250 U.S. 220 (1919); *Capital Trust Co.* v. *Calhoun*, 250 U.S. 208 (1919).

to it.[18] In entering a preliminary injunction against the enforcement of Section 3404(c), the district court too lightly cast aside a provision steadfastly retained by Congress and uniformly upheld by the courts. See *Walters* v. *National Association of Radiation Survivors*, No. A-214 (Sept. 27, 1984) (Rehnquist, Circuit Justice).

Furthermore, the injunctive relief ordered by the district court was entirely misconceived and inappropriate to the procedural deficiencies it found. As described above (see pages 4-10, *supra*), the veterans' benefit statute and implementing regulations make clear that the VA claims system is designed to be an informal and nonadversarial process. It cannot be doubted that Congress, in creating a statutory benefit program, may depart from the traditional litigation model for adjudicating claims and instead follow an alternative approach in which lawyers are not necessary to a fair procedure. This is precisely what Congress has done here. If, as the district court believed, the claims system is fundamentally unfair because it is operating in a more formal and adversarial fashion than Congress intended,[19] the appropriate remedy would be to require that the system conform to the congressional directive, not to invalidate the fee limitation and thereby work a further deviation from Con-

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[18] In addition, in 1967 the Veterans' Administration, at the direction of the President, established a United States Veterans' Advisory Commission to make a comprehensive study of the benefits system. Based on extensive review and public hearings, the Commission recommended that no change be made in the fee limitation provision. The Commission's study and recommendations were submitted to Congress. See *U.S. Veterans' Advisory Commission: Hearing Before the House Comm. on Veterans' Affairs*, 90th Cong., 1st Sess. 2554-2555 (1967); *Report of U.S. Veterans' Advisory Commission: Hearing Before the House Comm. on Veterans' Affairs*, 90th Cong., 2d Sess. 2713, 2741, 2822 (1968).

[19] In their motion to affirm in this Court, appellees heavily rely on the assertions that "[a]ctual adjudicative policies and practices [of the VA] often markedly diverge from CFR requirements" (NARS Mot. to Aff. 11) and that the VA frequently acts "[c]ontrary to its own rules and regulations" (*id.* at 17).

gress' purpose. By striking down the fee limitation in order to increase the participation of lawyers in the VA process, the district court's action can only result, contrary to Congress's intent, in an even more formal and adversarial claims process. Accordingly, assuming arguendo that the VA system works in an adversarial manner that is contrary to legislative intent and inconsistent with constitutional standards of fairness, it was nevertheless improper for the district court to enjoin the fee limitation rather than to direct compliance with the mandate of Congress.

Beyond this, however, our primary submission is that the district court's holding of unconstitutionality was erroneous. It is to this argument that we now turn. After first establishing that the ruling below is subject to review in this Court for legal error, we shall show that the informal and nonadversarial system created by Congress for veterans' benefit claims does not violate due process; the district court's conclusion to the contrary, based on its independent examination of the general functioning of the system, improperly ignored Congress's determination of the nature and operation of the VA procedure. In addition, we shall show that nothing in this system infringes on the First Amendment rights that appellees assert.

I. THE DISTRICT COURT'S HOLDING OF UNCONSTITUTIONALITY IS SUBJECT TO REVIEW IN THIS COURT FOR LEGAL ERROR

In their motion to affirm, appellees contend (NARS Mot. to Aff. 1, 20-21 & n.2) that the district court's order preliminarily enjoining Section 3404(c) may be reviewed by this Court only for an abuse of discretion. We submit that appellees' standard is unduly narrow, especially where, as here, the constitutionality of an Act of Congress is at issue. Because the district court's preliminary injunction rests on an error of law, it is subject to plenary review in this Court.

The Court has previously reversed preliminary injunctions that were premised on legal error. See *Withrow* v.

Larkin, 421 U.S. 35, 46, 55 (1975); *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52-53 (1938); see also *Houchins* v. *KQED*, 429 U.S. 1341, 1344 (1977) (Rehnquist, Circuit Justice). Lower federal courts have likewise recognized that appellate review of a preliminary injunction extends to the correctness of the district court's ruling on questions of law. See, *e.g.*, *Roland Machinery Co.* v. *Dresser Industries, Inc.*, No. 84-1509 (7th Cir. Dec. 21, ~~Aug. 31~~, 1984), slip op. 8, 17, 18-19; *Bell* v. *Sellevold*, 713 F.2d 1396, 1399-1400 (8th Cir. 1983), cert. denied, No. 83-852 (Jan. 16, 1984); *Rennie* v. *Klein*, 653 F.2d 836, 840-841 (3d Cir. 1981) (en banc), vacated on other grounds, 458 U.S. 1119 (1982), on remand, 720 F.2d 266 (3d Cir. 1983) (en banc); *Wright* v. *Rushen*, 642 F.2d 1129, 1132 (9th Cir. 1981); *Buffalo Courier-Express* v. *Buffalo Evening News, Inc.*, 601 F.2d 48, 59-60 (2d Cir. 1979) (Friendly, J.); *Delaware & H. Ry.* v. *United Transportation Union*, 450 F.2d 603, 620-621 (D.C. Cir.) (Leventhal, J.), cert. denied, 403 U.S. 911 (1971); see also 7 *Moore's Federal Practice* ¶ 65.21, at 65-154 & n.26 (1984).

It is, of course, axiomatic that a district court "lacks discretion to apply the law improperly." *Wright* v. *Rushen*, 642 F.2d at 1132. And "'on questions of law [the appellate court] owe[s] no deference * * * to the [d]istrict [c]ourt'" (*Bell* v. *Sellevold*, 713 F.2d at 1399 (citation omitted)); rather, "[i]f the appellate court has a view as to the applicable legal principle that is different from that premised by the trial judge, it has a duty to apply the principle which it believes proper and sound." *Delaware & H. Ry.*, 450 F.2d at 620. Thus, "[i]nsofar as the action of the trial judge on a request for preliminary injunction rests on a premise as to the pertinent rule of law, that premise is reviewable fully and de novo in the appellate court" (*ibid.*). For these reasons, and in order to ensure that the district court's "exercise of a power so far-reaching * * * [is] subject to effective, and not merely perfunctory, appellate review" (*Roland Ma-*

chinery Co., slip op. ~~17~~ 19, see also *Buffalo Courier-Express*, 601 F.2d at 59), a preliminary injunction—particularly a preliminary injunction preventing enforcement of a federal statute on constitutional grounds—should be "set aside if the district court erred in the legal standard it applied in its review of the probability of success on the merits." *Wright* v. *Rushen*, 642 F.2d at 1132.

To be sure, it is an oft-cited "rule of practice" (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. at 52) that a preliminary injunction is to be reviewed under the abuse-of-discretion standard and "ordinarily * * * will not be disturbed on appeal" (*ibid.*). But this "narrow standard of review springs from the realization that the proof at a hearing for a preliminary injunction is abbreviated and that the trial court, under time pressures, may not have the opportunity for the more mature consideration of issues that is expected in usual adjudications." *Rennie* v. *Klein*, 653 F.2d at 840. As a result, it may be appropriate for an appellate court to review a preliminary injunction under a deferential "abuse of discretion" standard if, for example, the need for an expeditious ruling at the trial level precludes the development of a full factual record on which the outcome of the controversy will turn. See, *e.g.*, *University of Texas* v. *Camenisch*, 451 U.S. 390, 394-396, 398 (1981); *Brown* v. *Chote*, 411 U.S. 452, 456-457 (1973). That rationale is inapplicable here, however. First, as we argue below (see pages 33-38, *infra*), the factual proceedings in the district court are irrelevant to a proper disposition of this case; in any event, the district court had ample opportunity to consider the issues in a lengthy opinion, and appellees engaged in extensive discovery to support their request for an injunction. Compare *Roland Machinery Co.*, slip op. ~~16~~, *Rennie* v. *Klein*, 17-18 653 F.2d at 841. Moreover, the district court's decree, while formally a preliminary injunction, is an exceedingly broad order (see page 14, *supra*) that does not simply preserve the status quo pending trial (see 7 *Moore's Federal Practice* ¶ 65.04[1], at 65-36 (1984); *Camenisch*,

451 U.S. at 395) but instead changes the existing situation and grants the complete affirmative relief that would be sought in a permanent injunction. Compare *Rennie* v. *Klein*, 653 F.2d at 841.[20]

In these circumstances, there is no obstacle to the Court's review on the merits of the legal validity of the preliminary injunction entered below. Because, as we now demonstrate, the district court's order is premised on a decisive legal error, it should be reversed.[21]

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[20] As we pointed out in our jurisdictional statement (at 23 n.15) and as appellees did not dispute in their motions to affirm, it appears that the issue of a permanent injunction probably would not have been resolved by the district court for a year or more, and therefore the preliminary injunction in this case, unlike in many other cases, was intended to be in effect for an extended period.

[21] In addition, in an appeal from a preliminary injunction, an appellate court has jurisdiction to review the denial by a district court, as in this case (see page 11 note 12, *supra*), of a motion to dismiss the complaint. See, *e.g.*, *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 286-287 (1940), and cases cited therein; *Energy Action Educational Foundation* v. *Andrus*, 654 F.2d 735, 745-746 & n.54 (D.C. Cir. 1980), rev'd on other grounds *sub nom. Watt* v. *Energy Action Educational Foundation*, 454 U.S. 151 (1981); *FTC* v. *Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1310-1311 (D.C. Cir. 1968); see also *Alligator Co.* v. *LaChemise Lacoste*, cert. denied, 421 U.S. 937, 938 n.* (1975) (White, J., joined by Blackmun and Powell, JJ., dissenting). By enabling the appellate court (which otherwise has jurisdiction by virtue of the appeal from the preliminary injunction) to reverse the erroneous denial of a motion to dismiss, this rule saves both the lower court and the parties from the needless delay and expense of further proceedings. See *Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 523-525 (1897). Because, for the reasons discussed below, the district court erred in denying appellants' motion to dismiss, the Court should reverse that ruling and order the complaint dismissed.

II. SECTION 340(c), AS AN INTEGRAL PART OF THE INFORMAL AND NONADVERSARIAL VETERANS' BENEFIT SYSTEM ESTABLISHED BY CONGRESS, DOES NOT VIOLATE PROCEDURAL DUE PROCESS

A. Procedural Due Process Is Satisfied By A Fundamentally Fair Procedure That Affords A Meaningful Opportunity To Be Heard

Procedural due process is a guarantee of fundamental fairness. See *Santosky* v. *Kramer*, 455 U.S. 745, 754 (1982); *Lassiter* v. *Department of Social Services*, 452 U.S. 18, 24, 33 (1981). This standard does not require that administrative processes be subject to the "'wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 348 (1976), quoting *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). On the contrary, "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances." *Eldridge*, 424 U.S. at 348. Simply put, "[the] fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Id.* at 333, quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). And the requisites of procedural fairness are to be framed in terms of "the generality of cases, not the rare exceptions." *Eldridge*, 424 U.S. at 344; see also, *e.g.*, *Santosky* v. *Kramer*, 455 U.S. at 757; *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979); *Parham* v. *J.R.*, 442 U.S. 584, 612-613 (1979).

In determining whether an administrative system affords a meaningful opportunity to be heard, "'due process is flexible and calls for such procedural protections as the particular situation demands.'" *Eldridge*, 424 U.S. at 334, quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The Due Process Clause "'is not so rigid as to require that the significant interests in informality, flexibility and economy must always be sacrificed.'" *Lassiter*,

452 U.S. at 31, quoting *Gagnon* v. *Scarpelli*, 411 U.S. 778, 788 (1973). Thus, within broad bounds, Congress is free to experiment with different administrative mechanisms and to adapt the procedures it prescribes to the decisional context at hand. See *Parham* v. *J.R.*, 442 U.S. at 608 n.16; *Whalen* v. *Roe*, 429 U.S. 589, 597-598 (1977). An administrative process is constitutionally sufficient if it affords the claimant "'the right to support his allegations by argument however brief, and, if need be, by proof, however informal.'" *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 16 n.17 (1978), quoting *Londoner* v. *Denver*, 210 U.S. 373, 386 (1908).

Of course, given the inherent nature of due process, application of the constitutional principle in any particular situation will not be governed by a bright-line test. See *Goss* v. *Lopez*, 419 U.S. 565, 578 (1975). Rather, a careful weighing of the relevant public and private interests is required. See *Eldridge*, 424 U.S. at 334-335. But in undertaking that inquiry, courts must be mindful that

> [t]he role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy. * * * Thus, it would be improper simply to impose * * * procedures * * * because the reviewing court may find them preferable. Instead, the courts must evaluate the particular circumstances and determine what procedures would satisfy the minimum requirements of due process * * *.

Landon v. *Plasencia*, 459 U.S. 21, 34-35 (1982). As Justice Holmes observed, "[g]reat constitutional provisions must be administered with caution * * *, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, Kansas & Texas Ry.* v. *May*, 194 U.S. 267, 270 (1904).

B. In Light Of The Informal And Nonadversarial Claims System In Which Service Organizations Provide Effective Assistance To Veterans Without Charge, Section 3404(c) Does Not Deny Claimants A Fundamentally Fair Procedure

Under the foregoing standard, 38 U.S.C. 3404(c) is not violative of due process. The district court concluded (J.S. App. 23a) that procedural due process requires the right to be represented by an attorney. However, this Court has recognized that a lawyer (whether retained or appointed) is not always necessary to a fair proceeding and that the interest in being represented by counsel in a given procedural setting must be assessed in light of competing societal considerations. See *Lassiter*, *supra*; *Baxter* v. *Palmigiano*, 425 U.S. 308, 312, 314-315 (1976); *Middendorf* v. *Henry*, 425 U.S. 25 (1976); *Goss* v. *Lopez*, 419 U.S. at 583; *Wolff* v. *McDonnell*, 418 U.S. 539, 569-570 (1974); *Gagnon* v. *Scarpelli*, 411 U.S. at 787-788; *Vitek* v. *Jones*, 445 U.S. 480, 499-500 (1980) (Powell, J., concurring in part); cf. *Schweiker* v. *McClure*, 456 U.S. 188, 199 n.14 (1982); *Parham* v. *J.R.*, 442 U.S. at 607. Viewed in the context of the informal and nonadversarial claims system in which veterans are provided expert representation by service organizations without charge, the fee limitation in Section 3404(c) does not deny fundamental fairness.[22]

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[22] The district court heavily relied (see pages 12-13, *supra*) on its view that the VA and the service organizations have inadequate resources to provide the same level of preparation and assistance to every claimant that a privately retained representative could. Even assuming that to be true, however, the court's concern would not implicate a right to *counsel*; presumably a Legal Services attorney (who would not charge a fee and thus would not be constrained by Section 3404(c) from representing a client), or indeed a representative from a service organization who happens to be a lawyer, would labor under the same sorts of institutional and resource limitations. A right to counsel must rest on the special capabilities of an attorney and cannot be invoked to further other objectives that have little if anything to do with the role of lawyers. See *United States* v. *Gouveia*, No. 83-128 (May 29, 1984), slip op. 10-11.

The VA system is designed to process a high volume of largely fact-bound claims "swift[ly]" and "efficient[ly]." *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 673 (1977).[23] To achieve this objective, the benefit claims procedure is, as described above (see pages 4-10, *supra*), nonadversarial and informal.[24] The VA is specifically charged to grant claimants all benefits that can be supported, and, consistently with that obligation,

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[23] In 1983, nearly 3 million cases involving service-connected death and disability claims (as well as more than 1.5 million non-service-connected claims, which are subject to the same administrative procedures and fee limitations) were on the VA rolls. Moreover, the Board of Veterans' Appeals decided over 38,000 cases in 1983 and had approximately 64,000 appeals pending at the end of the year. VA Ann. Rep. 63, 113-114 (1983).

[24] This nonadversarial procedural system is reflective of the broader relationship between the government and veterans. "The solicitude of Congress for veterans is of long standing." *United States* v. *Oregon*, 366 U.S. 643, 647 (1961); see also pages 31-32 & note 30, *infra*. In addition to service-connected death and disability benefits, Congress has provided a wide range of services and assistance for veterans, including "pensions, homes, hospitals and other facilities" (*United States* v. *Oregon*, 366 U.S. at 647), educational and vocational benefits, readjustment and counseling help, and housing and small business loans. See 38 U.S.C. 301-1000, 1500-2021 (chs. 11-43); see also, *e.g.*, *Regan* v. *Taxation With Representation*, 461 U.S. 540, 550-551 (1983); *Monroe* v. *Standard Oil Co.*, 452 U.S. 549, 554-560 (1981); *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 261 (1979); *Johnson* v. *Robison*, 415 U.S. at 374-383. In effect, "programs in aid of veterans have evolved into a comprehensive welfare system" and generally are of "more generous dimensions" than other government benefit programs. S. Levitan & K. Cleary, *Old Wars Remain Unfinished* ix, 27 (1973). Congress's special concern for veterans is also reflected in the substantive provisions of the service-connected death and disability system; for example, unlike many other programs, such benefits are available for partial as well as total disability, and a variety of legal presumptions may be invoked by the claimant to establish his eligibility. It would be unwarranted to view the VA claims procedure, including the fee limitation, in isolation by wresting it from the broader context of the supportive and nonadversarial position of the government toward veterans.

it administers the law under a broad interpretation and resolves any reasonable doubt in favor of the claimant. The VA is also responsible for assisting the claimant to develop the relevant facts and for suggesting facts helpful to his position that the claimant might have overlooked. Throughout the proceeding no VA personnel—whether lawyers or nonlawyers—appear in opposition to the claimant or seek to act as an adversary. Strict rules of evidence and procedure do not apply, and there is no formal cross-examination or rebuttal of evidence. Finally, the procedural rules applicable to the system are exceptionally liberal—for example, a claimant may initiate a benefit claim by an informal request and is not precluded from seeking benefits for a continuing disability that arose many years before; a claimant has a full year to take an appeal to the BVA from an adverse initial decision; and BVA decisions may be reconsidered or reopened without regard to the usual standards of finality and preclusion such as res judicata.[25] Compare *Santosky* v. *Kramer*, 455 U.S. at 759-764; *Lassiter*, 452 U.S. at 29; *id.* at 37, 42-44, 47-48, 50 n.18 (Blackmun, J., dissenting); *Middendorf* v. *Henry*, 425 U.S. at 40-41, 45; *Wolff* v. *McDonnell*, 418 U.S. at 569-570; *Gagnon* v. *Scarpelli*, 411 U.S. at 787-789; *Richardson* v. *Perales*, 402 U.S. 389, 400-401, 403 (1971).[26]

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[25] 38 U.S.C. 211(a), which bars judicial review of the VA decision on benefit claims, also reflects the informal and nonadversarial nature of the process. Among other things, the preclusion of judicial review serves to ensure that the claims procedure remains expeditious and inexpensive and that the technical and complex determinations of the VA are not forced into the more rigid format of judicial decisionmaking. See *Johnson* v. *Robison*, 415 U.S. at 370.

[26] We also note that appeals in claims involving Agent Orange or radiation exposure are treated by the BVA as specialty areas and are assigned only to panels designated to handle them. See VA Ann. Rep. 114-115 (1983). In addition, the BVA has sought to maintain its expertise in these areas through, *e.g.*, its relations with the VA's Agent Orange projects office and the Army Agent Orange Task Force (*id.* at 115).

In addition, accredited representatives of service organizations offer free assistance to the veteran in understanding the process and presenting his claim. These service officers are "well trained and experienced," and they are "fully familiar with every facet of veterans' laws and VA regulations, with a thorough knowledge of [VA] procedures and precedents, and with a wealth of experience gained through years of advocacy in behalf of claimants." *1973 Hearings* 457 (statement of VA General Counsel Corcoran). Such representatives provide "excellent representation at no cost to claimants" and "'render sophisticated and expert assistance in prosecuting a claim.'" S. Rep. 97-466, *supra*, at 50-51 (citation omitted). See also Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stan. L. Rev. 905, 915, 918-919 (1975).[27] Compare *Baxter* v. *Palmigiano*, 425 U.S. at 311-312, 315; *Wolff* v. *McDonnell*, 418 U.S. at 570; *Vitek* v. *Jones*, 445 U.S. at 499-500 (Powell, J., concurring in part).[28]

The assistance provided by service officers is well-suited to the types of issues that generally arise in the VA process. As the district court recognized (J.S. App. 28a, 31a), benefit claims largely turn not on legal issues but on medical and vocational issues such as the nature and cause of the death or disability, whether the injury or disease was incurred or aggravated during military service, and the extent or "rating" of the claimant's disability. See also Rabin, *supra*, 27 Stan. L. Rev. at 918. Moreover, questions of credibility and demeanor do not play a significant role in the decision of these matters.

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[27] The role of service organizations is further discussed below (see pages 38-43, *infra*).

[28] In their motions to affirm (NARS Mot. to Aff. 6-8; American G.I. Forum Mot. to Aff. 2), appellees describe the VA system as though service organizations did not exist and veterans were required to proceed entirely unassisted. By virtually ignoring the service representatives, appellees have distorted an integral feature of the congressional design.

To be sure, medical and vocational issues may sometimes be difficult to resolve and require complex analysis and specialized judgment. But there is surely no reason to believe that only those people who possess legal training are qualified to provide assistance on such questions, and nothing in the Due Process Clause dictates that attorneys rather than skilled non-lawyer representatives must be involved in order to render the process fundamentally fair. Compare *Parham* v. *J.R.*, 442 U.S. at 607, 609; *Eldridge*, 424 U.S. at 343-345 & n.28; *Richardson* v. *Perales*, 402 U.S. at 404; *Vitek* v. *Jones*, 445 U.S. at 499-500 (Powell, J., concurring in part).

The fee limitation is an important aspect of the informal and nonadversarial claims system that Congress has established. See *Gendron* v. *Saxbe*, 389 F. Supp. at 1307. As the Court has recognized, "'[t]he introduction of counsel into a * * * proceeding will alter significantly the nature of the proceeding' * * * [and] would inevitably give the proceeding[] a more adversary cast * * *." *Wolff* v. *McDonnell*, 418 U.S. at 569-570, quoting *Gagnon* v. *Scarpelli*, 411 U.S. at 787. See also *Baxter* v. *Palmigiano*, 425 U.S. at 314-315. Thus, the "presence of counsel will turn a brief, informal hearing * * * into an attenuated proceeding which consumes * * * resources * * * to a degree which Congress could properly have felt to be beyond what is warranted." *Middendorf* v. *Henry*, 425 U.S. at 45.[29] Section 3404(c), by restricting

[29] The Court has noted that the added expense of more formal and complex procedures may work to the ultimate detriment of claimants by diverting from benefit payments to administrative costs the limited funds allocated to the program. See *Eldridge*, 424 U.S. at 348:

> [T]he Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost. Significantly, the cost * * * may in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited.

See also *Gendron* v. *Saxbe*, 389 F. Supp. at 1307.

the participation of lawyers, helps to ensure the informality and nonadversarial nature of the claims process.

The fee limitation in Section 3404(c) serves several other legitimate purposes as well. For example, it "protect[s veterans] and secure[s] to them the use of the [payments] granted in their behalf" by ensuring that such funds "inure solely to the benefit of the [veteran]" and are not diminished by lawyer's fees (*United States* v. *Hall*, 98 U.S. at 353-354; see also *United States* v. *Fairchilds*, 25 F. Cas. at 1037);[30] in light of the VA's obligation to assist in establishing a claim and the availability of free assistance from the service organizations, Section 3404(c) guarantees that benefit payments will go to eligible veterans as Congress intended and will not be consumed in attorney's fees for legal representation that, in the overall context of the VA system, Congress concluded was not necessary to a fair disposition.[31] In

[30] Federal veterans' benefits were first established by Congress in the Act of Sept. 29, 1789 (1 Stat. 95). See *United States* v. *Hall*, 98 U.S. at 346. From the beginning, Congress has "enact[ed] such regulations as will secure to the beneficiaries of the pensions granted the exclusive use and benefit of the money appropriated and paid for that purpose" (*id.* at 352). For example, in the Act of Mar. 23, 1792, Congress prohibited the "sale, transfer or mortgage * * * of the pension * * * [of a] soldier * * * before the same shall become due" (1 Stat. 245). See also *United States* v. *Hall*, 98 U.S. at 349-352. The limitation on attorney's fees, first adopted during the Civil War, was "[f]or the same purpose and to the same end" (*id.* at 353)—"to prevent the diversion of pension-money from inuring solely to the use and benefit of those to whom the pensions are granted" (*id.* at 354).

[31] In enacting the various predecessors of the fee limitation now contained in 38 U.S.C. 3404(c), Congress has indicated its view that the claims system should provide benefits to eligible veterans without diminution and that the retention of a paid attorney—with the concomitant reduction in benefits that the veteran eventually receives—is not needed. See, *e.g.*, Cong. Globe, 41st Cong.,

addition, the limitation "protect[s] just claimants from extortion or improvident bargains" in their dealings with unscrupulous attorneys (*Calhoun* v. *Massie*, 253 U.S. at 173) and thus prevents overreaching and sharp practices. See *Staub* v. *Johnson*, 519 F.2d 298, 300 (D.C. Cir. 1975); *United States* v. *Marks*, 26 F. Cas. at 1163.[32] And, by eliminating any possible incentive for counsel to bring unwarranted claims, it guards "the Treasury from frauds and imposition" (*Calhoun* v. *Massie*, 253 U.S. at 173).[33]

All of these considerations support the fee limitation in Section 3404(c). To achieve these objectives, Congress has, in effect, set up an alternative dispute resolution procedure in which lawyers are not necessary to a fair determination of benefit claims. Because VA benefits are "gratuities" (*Lynch* v. *United States*, 292 U.S. 571, 577 (1934)) that are funded entirely from public appropriations and do not involve financial contributions from veterans, Congress should be accorded particularly wide latitude to structure the process by which claims are adjudicated and benefits paid. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134, 151-155 (1974) (plurality opinion); *Calhoun* v. *Massie*, 253 U.S. at 176. The district court erred in striking down this legislative "experiment" in claims procedure and in substituting a claims system that, as we now show, Congress has repeatedly rejected.[34]

2d Sess. 1965, 4459 (1870); 7 Cong. Rec. 4841 (1878); 22 Cong. Rec. 146 (1890); 22 Cong. Rec. 2176, 2177, 2178, 2185, 2187 (1891); H.R. Rep. 471, 65th Cong., 2d Sess. 1 (1918); 56 Cong. Rec. 5222, 5223, 5224 (1918).

[32] See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 2101, 2102, 3119 (1862); Cong. Globe, 41st Cong., 2d Sess. 1967, 4459 (1870); 7 Cong. Rec. 4840 (1878); H.R. Rep. 471, 65th Cong., 2d Sess. 1-2 (1918); 56 Cong. Rec. 5221, 5223 (1918).

[33] See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 4459 (1870); 15 Cong. Rec. 3240 (1884); 22 Cong. Rec. 2180 (1891).

[34] In their motion to affirm, appellees rely (NARS Mot. to Aff. 2, 16) on the assertion that the VA seldom grants benefits in so-

C. Congress Has Determined That The VA Claims System Operates In A Fair And Nonadversarial Manner, And The District Court Improperly Failed To Defer To That Congressional Determination

The district court invalidated Section 3404(c) on the basis of its conclusion, drawn from the record generated

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called "complex" claims such as those involving Agent Orange or radiation exposure. Even accepting appellees' implication that some of these cases were incorrectly decided, that would not establish that the claims system—let alone the fee limitation in particular—violates due process. See *Mackey* v. *Montrym*, 443 U.S. 1, 13 (1979); *Parham* v. *J.R.*, 442 U.S. at 612-613. But more importantly, there is no reason to believe either that such denials were erroneous or that they resulted from the absence of retained counsel.

Of particular significance is the recent "Agent Orange" litigation in the United States District Court for the Eastern District of New York. See *In re "Agent Orange" Product Liability Litigation*, MDL No. 381 (E.D.N.Y. filed Feb. 23, 1979). Begun in 1979, that class action sought damages from a large number of chemical companies for the deaths and disabilities of Vietnam veterans allegedly caused by exposure to Agent Orange and other herbicides. Immediately prior to trial, the defendants agreed, without admitting liability, to settle the litigation for $180 million plus interest. In reviewing the proposed settlement, Judge Weinstein, based on a thorough consideration of the extensive record in that case, found several difficulties in the plaintiffs' claims that led him to conclude that the settlement was favorable to the class and should be approved. For example, in its Preliminary Memorandum and Order on Settlement (Sept. 25, 1984), the court pointedly stated that "[t]he critical problem for the plaintiffs is to establish that the relatively small quantities of dioxin [the toxic ingredient in Agent Orange] to which service-persons were exposed in Vietnam caused their present disabilities. Here adequate proof is lacking" (*id.* at 115). This weakness on the issue of causation was repeatedly noted by the court (*e.g.*, *id.* at 11, 12, 15, 96, 104, 110-150, 216, 217, 269). As the court summarized the matter (*id.* at 103, quoting plaintiffs' memorandum):

> The basic problem with the plaintiffs' factual case * * * [is that the] "class action * * * is now careening toward a trial in May without the basic information necessary to establish a causal relation between exposure to dioxin contaminated phenoxy herbicides in Vietnam and the illness, disability, and death of the plaintiff veterans. There is not sufficient command

by the parties in this case, that in fact the VA claims system does not operate in an informal and nonadversarial way, that the assistance the VA and the service organizations provide to claimants is inadequate, and that the procedure is fundamentally unfair and hence a violation of due process in the absence of a right to retain an attorney without regard to the statutory fee limitation. These conclusions, which are essential to the holding below, are contrary to the determinations that Congress recently made concerning the nature and operation of the claims procedure. The district court simply disregarded the legislative assessment and, based on the evidence submitted by the litigants, undertook to re-weigh essentially the same contentions that had been presented to Congress and to make de novo findings on the same issues regarding the general workings of the VA sys-

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of the biological, chemical, medical, epidemiological, and genetic evidence to establish a causal relation between the disease, disability, and death of the plaintiff veterans much less the catastrophic polygenetic birth defects afflicting their children."

The court reiterated the same deficiency in the plaintiffs' case in a hearing on the issue of attorney's fees, emphasizing again that "[t]he veterans have not shown, and the lawyers, despite their great work in favor of the veterans, have not been able to demonstrate that Agent Orange caused the veterans problems" and that "I find and have found that [plaintiffs have] shown no factual connection of any substance between the diseases and the alleged cause" (9/26/84 Tr. 8, 20; see also 10/1/84 Tr. 55, 63).

Congress, too, has recently noted the lack of evidence of causation between exposure to Agent Orange or radiation and subsequent death or disability. In the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, § 2, 98 Stat. 2725 (which is discussed further at pages 44-45 note 44, *infra*), Congress specifically concluded that "[t]here is scientific and medical uncertainty regarding such long-term adverse health effects [from exposure to herbicides containing dioxin or to ionizing radiation]." And in Section 3 of the Act (98 Stat. 2727), Congress stressed that veterans' benefits for dioxin or radiation exposure are to be provided for "disabilities arising after * * * service that are connected, *based on sound scientific and medical evidence*, to such service" (emphasis added).

tem. In effect, the district court conducted a new set of legislative-type hearings and second-guessed the determinations that Congress had reached. This was not within the district court's province.[35]

In a wide variety of areas, the Court has recognized that a district court's

> "responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion * * *." "It makes no difference that the facts [relied on by the legislature] may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

Vance v. *Bradley*, 440 U.S. 93, 111-112 (1979), quoting *Firemen* v. *Chicago, R.I. & P.R.R.*, 393 U.S. 129, 138-139 (1968), and *Rast* v. *Van Deman & Lewis Co.*, 240 U.S. 342, 357 (1916). Thus, "[i]t is not for the courts to reexamine the validity of * * * legislative findings and reject them" (*Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 94 (1961)) or "to substitute * * * [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker* v. *Goldberg*, 453 U.S. 57, 68 (1981); see also *id.* at 81-83.[36]

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[35] Because it was inappropriate for the district court to conduct an evidentiary proceeding in the circumstances presented here, we have no occasion to discuss the record or the court's asserted findings of fact. That should not be taken, however, to suggest in any way that we accede to the court's characterization of the evidence. To the extent it proves necessary to this Court's understanding of the case, we shall respond in our reply brief to any factual submissions that appellees seek to rely on.

[36] See also, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 26 n.18; *Kleppe* v. *New Mexico*, 426 U.S. 529, 541 n.10 (1976); *CSC* v. *Letter Carriers*, 413 U.S. 548, 566-567 (1973); *Radice* v. *New York*, 264 U.S. 292, 294 (1924); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. Cinn. L. Rev. 199, 207, 228-230 (1971).

This principle of judicial restraint "is a limitation stemming, not from the * * * [substantive constitutional standard being applied], but from the nature of judicial review. * * * The nature of the judicial process makes it an inappropriate forum for the determination of complex factual questions of the kind so often involved in constitutional adjudication." *Oregon* v. *Mitchell*, 400 U.S. 112, 247-248 (1970) (opinion of Brennan, White, and Marshall, JJ.). In reviewing the constitutionality of a federal statute—" 'the gravest and most delicate duty that [the judiciary] is called upon to perform' " (*Rostker* v. *Goldberg*, 453 U.S. at 64 (citation omitted))—courts are to be guided by due regard for the proper separation of functions and for the superior ability of the legislature to gather information and analyze issues of legislative fact.[37] Indeed, this principle is particularly appropriate with respect to questions of procedural fairness, since "procedural due process rules are shaped by the risk of error inherent to the truthfinding process as applied to the generality of cases, not the rare exceptions." *Eldridge*, 424 U.S. at 344. Just as the legislature in *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982), was "in a far better position than a court to form a correct judgment concerning" the fairness and adequacy of a statutory grace period for a new law (*id.* at 532), so, too, in this case Congress is better able than a district court to appraise the fairness and adequacy of the operation of the VA claims system.

To be sure, it is the ultimate responsibility of the judiciary to decide whether the constitutional standards of

[37] See, *e.g.*, *Jones & Laughlin Steel Corp.* v. *Pfeifer*, No. 82-131 (June 15, 1983), slip op. 27; *Texaco, Inc.* v. *Short*, 454 U.S. 516, 532-533 (1982); *Eastland* v. *United States Servicemen's Fund*, 421 U.S. 491, 504-505 (1975); *Branzburg* v. *Hayes*, 408 U.S. 665, 693-694 (1972); Cox, *supra*, 40 U. Cinn. L. Rev. at 209, 255; see also *United States* v. *Leon*, No. 82-1771 (July 5, 1984), slip op. 2 (Blackmun, J., concurring); *City of Akron* v. *Akron Center for Reproductive Health, Inc.*, No. 81-746 (June 15, 1983), slip op. 5 n.4, 14-15 (O'Connor, J., dissenting).

due process are satisfied.[38] But in addressing that question, the courts are not free to ignore the legislature's findings concerning those subjects of broad and general applicability—such as are involved in understanding and evaluating the nature of the VA claims procedure—that are not matters of historical or adjudicative fact and do not lend themselves to resolution through the judicial process in litigation between two parties. Where, as here, a broad challenge is made to the constitutionality of a federal statute, the validity of the statute does not vary from case to case and district to district depending upon the record that the parties develop in the particular lawsuit.

Of course, in discharging its legislative function, Congress is not required to make factual determinations. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 179 (1980); *Katzenbach* v. *McClung*, 379 U.S. 294, 299, 304 (1964); see also *Whalen* v. *Roe*, 429 U.S. at 598. But where Congress has done so, a court must defer to those determinations unless they are "so clearly wrong that [they] may be characterized as 'arbitrary,' 'irrational,' or 'unreasonable.' " *Oregon* v. *Mitchell*, 400 U.S. at 248 (opinion of Brennan, White, and Marshall, JJ.); see also, *e.g.*, *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. at 94-95; *Block* v. *Hirsh*, 256 U.S. 135, 154 (1921). And such deference is especially appropriate in this case because the congressional determination involves the operation of an administrative system that Congress itself has created and the ex-

[38] Even in making that legal determination, courts should give substantial weight to the views of Congress and the responsible agency concerning the procedures necessary to ensure fairness in the administrative process. See *Middendorf* v. *Henry*, 425 U.S. at 43-44; *Eldridge*, 424 U.S. at 349; *Columbia Broadcasting System, Inc.* v. *Democratic National Comm.*, 412 U.S. 94, 102 (1973); *Arnett* v. *Kennedy*, 416 U.S. 134, 202 (1974) (White, J., concurring in part and dissenting in part); see also *Rostker* v. *Goldberg*, 453 U.S. at 64; *Fullilove* v. *Klutznick*, 448 U.S. 448, 472 (1980) (plurality opinion); *CSC* v. *Letter Carriers*, 413 U.S. at 567.

tent to which that system is, as Congress intended, informal and nonadversarial.

In light of this principle, the district court clearly erred in invalidating the fee limitation in Section 3404(c) based on its view of the workings of the VA benefit system. Congress has expressly inquired into that issue in recent years and determined, contrary to the conclusion of the district court, that the system operates fairly and that veterans receive effective assistance in presenting their claims.

Over the last decade, a number of bills have been introduced in Congress to modify the VA claims system in various respects, including modification of the fee limitation in Section 3404(c). See S. 636, 98th Cong., 1st Sess. (1983); S. 349, 97th Cong., 1st Sess. (1981); S. 330, 96th Cong., 1st Sess. (1979).[39] Each of these bills passed the Senate but failed of adoption in the House. In the course of considering these and other proposals, Congress undertook an extensive examination of the VA procedure and gave particular attention to the limitation on attorney's fees. This legislative treatment leaves no doubt that Congress determined that the operation of the process is fair and adequate.[40]

The principal congressional statement on this issue is the recent report of the Senate Committee on Veterans'

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[39] See also S. 364, 95th Cong., 1st Sess. (1977), which, following hearings, was redrafted and introduced in the 96th Congress as S. 330.

Bills have also been introduced in the current Congress to amend Section 3404(c) and to provide for judicial review of VA benefit decisions. See H.R. 585, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. H146-H147 (daily ed. Jan. 24, 1985); H.R. 313, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. E6 (daily ed. Jan. 3, 1985).

[40] Indeed, the very fact that Congress has deliberately retained the fee limitation for more than a century indicates its view that such a provision does not undermine the fairness and adequacy of the nonadversarial claims system. See *Staub* v. *Johnson*, 519 F.2d 298, 300 (D.C. Cir. 1975); *Gendron* v. *Saxbe*, 389 F. Supp. at 1307.

Affairs. See S. Rep. 97-466, 97th Cong., 2d Sess. (1982).[41] In its general summary of the bill, the Committee noted with approval "the VA's present practices of providing claimants all reasonable assistance in the development of claims and construing the evidence liberally in favor of the claimant." *Id.* at 19; see also *id.* at 27. It also specifically recognized that VA claimants are given

> some advantages not afforded to claimants before other agencies * * * [, including] the VA's very liberal standards for the admission of evidence, and free representation before the VA by skilled officers of the various national veterans' service organizations—advantages which are often credited for the informal, "nonadversarial" nature of VA proceedings. * * * [T]he Committee[] [has] abiding respect both for the high quality of representation offered by the veterans' service organizations and for the BVA's expertise as an arbiter of factual issues.

Id. at 25; see also *id.* at 26. And the Committee explained, in connection with a proposed provision for judicial review of VA benefit decisions, that the bill was not based on any concern that "wide-spread injustices [exist under the current system]; to the contrary, there is no evidence that most claimants are not satisfied with the resolution of their claims." *Id.* at 24; see also *id.* at 38. Hence, the Committee found that "the existing internal adjudications procedures of the VA are generally fair and workable." *Id.* at 31; see also *id.* at 32.

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[41] The most recent bill, S. 636, was substantially similar to the predecessor bill, S. 349, and therefore the committee report on S. 636 reaffirmed and incorporated by reference the previously issued report. See S. Rep. No. 98-130, 98th Cong., 1st Sess. 23 (1983); see also *id.* at 17, 22, 48, 53-54. S. Rep. 97-466, discussed in the text, is the report accompanying S. 349. See also S. Rep. 96-178, 96th Cong., 1st Sess. 23-25, 52-56, 64 (1979); this report, which accompanied S. 330, is similar to S. Rep. 97-466 in its treatment of the relevant issues (although we note that S. 330 would have allowed greater fees for attorneys following the issuance of the statement of the case rather than, as under S. 349 and S. 636, following the BVA's decision, see page 40, *infra*).

With particular reference to the issue of the fee limitation, the Committee expressed its

> concern[] that any changes relating to attorneys' fees be made carefully so as not to induce unnecessary retention of attorneys by VA claimants and not to disrupt unnecessarily the very effective network of nonattorney resources that has evolved in the absence of significant attorney involvement in VA claims matters. The mainstays of that network are veterans' service officers, employees of national veterans' service organizations, and other organizations approved pursuant to present section 3402 of title 38, who provide representation without charge to veterans and other claimants before the VA, without regard to whether the individual claimant is a member of the service officer's organization. It is widely recognized, as the VA noted * * * [,] that veterans' service officers "render sophisticated and expert assistance in prosecuting a claim", and the Committee strongly believes that the availability of their services should be maintained and fostered.

S. Rep. 97-466, *supra*, at 49-50. Thus, the Committee concluded that "there is a strong and vital system of veterans service officers who provide excellent representation at no cost to claimants." *Id.* at 50-51.

These considerations were reflected in the amendment to Section 3404(c) that the Committee reported, which would have left standing the $10 fee limitation for administrative proceedings through the decision of the BVA and would have allowed greater fees only for subsequent administrative stages (such as motions to reconsider or reopen) and suits for judicial review (as authorized in the bill). See S. Rep. 97-466, *supra*, at 23, 49-54. The Committee recognized that retained attorneys would generally be inappropriate for the submission and initial processing of a claim, since the procedure is relatively uncomplicated, the VA is responsible for securing the relevant medical records, and service organizations provide free representation; accordingly, "there would seem

to be no need for the assistance of an attorney in order to initiate the claims process by completing and filing an application." *Id.* at 50. Likewise, "even if the initial decision is adverse, the Committee believes that it may be unnecessary for a claimant to incur the substantial expenses for attorney representation that may be involved in appealing the case for the first time" (*ibid.*); as the Committee observed, the initiation and pursuit of an appeal are "very simple" (*id.* at 51; see also *id.* at 51-52), and the "claimant may well prevail, as many claimants currently do, without legal representation when the case is first before the BVA" (*id.* at 50). For these reasons, "continuing to discourage attorney representation at the initial application, decision and appeal stages would * * * appropriately serve to protect claimants' benefits * * *. [The bill] is intended to continue to restrict attorney representation in the initial claims process." *Id.* at 50, 51; see also *id.* at 53, 63.

In contrast, "once the BVA renders a decision adverse to the claimant on the merits, the need for the assistance of an attorney is then markedly greater with respect to such issues as seeking a reopening and reconsideration and deciding whether to proceed to court [as allowed under the bill]." S. Rep. 97-466, *supra*, at 50. In that circumstance, where there is "a concern that the claim is likely to be denied a second time by the Board of Veterans' Appeals and will be appealed to court * * * [, the] claimant could well conclude * * * that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record." *Id.* at 51; see also *id.* at 53.

Two conclusions clearly emerge from this discussion. First, the Committee was fully satisfied with the assistance provided to the claimant by the VA and the service organizations, and it considered the administrative system to be informal, nonadversarial, and fair. Second, in

connection with a new provision for judicial review, the Committee proposed to amend Section 3404(c) to permit greater fees to be paid to retained attorneys in—but only in—the reconsideration stage of the administrative process and in judicial proceedings. These conclusions flatly contradict the district court's assessment in this case that the VA claims process is adversarial and formal, that the VA and the service organizations furnish inadequate assistance to claimants, and that the administrative system is fundamentally unfair in the absence of retained attorneys; indeed, even when Congress contemplated an increased role for attorneys incident to judicial review, it retained a fee limitation for the basic administrative process that is irreconcilable with the view taken by the district court here.

In considering an amendment to the fee limitation, Congress was fully apprised of the nature and operation of the VA benefit system. Various bills were before Congress over a number of years, and extensive hearings were held on these proposals as well as on other matters concerning the VA and attorney's fees.[42] And, of particular significance, Congress was informed that claimants represented by service organizations have virtually the same rate of success—and in some instances a higher rate—than claimants represented by an attorney. See S. Rep. 96-178, *supra*, at 101; *Veterans' Administration Ad-*

[42] See, *e.g.*, S. Rep. 97-466, *supra*, at 81-139; *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983), *e.g.*, *id.* at 58, 64, 67, 93, 109; *Judicial Review of Veterans' Claims: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983), *e.g.*, *id.* at 39-46, 57, 178-182. Similar hearings were conducted in 1977, 1979, 1980, and 1981; these proceedings are summarized in S. Rep. 97-466, *supra*, at 37, and S. Rep. 96-178, *supra*, at 16-17. See also *1973 Hearings* 444-463.

judication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearings on S. 636 Before the Senate Comm. on Veterans' Affairs, 98th Cong., 1st Sess. 67, 237, 252-256, 259 (1983). This empirical measure of performance strongly reinforces Congress's conclusion about the adequacy of the representation furnished by service organizations and the fairness of the claims system.

In sum, Congress has recently determined, based on a substantial legislative record, that the VA claims procedure is informal and nonadversary, that the VA and the veterans' service organizations provide expert assistance to claimants without charge, that retained attorneys are unnecessary to a fair administrative procedure, and that a large influx of paid attorneys in the administrative proceedings would be undesirable. In the face of these considered legislative conclusions, the district court erred in reaching a contrary result. A lawsuit between specific parties in a single court cannot serve as a forum to go behind the findings of Congress by conducting a legislative-type hearing on the overall operation of a complex nationwide benefit program.

D. The Wisdom Of The Fee Limitation Policy Is For Congress To Decide

We recognize that policy objections may be raised to the fee limitation in Section 3404(c). For example, it could be argued that the $10 maximum has become obsolete and that a higher figure would be appropriate. Likewise, some would consider that another form of limitation—such as a percentage of the benefit award rather than an absolute dollar amount—is preferable. And others might contend that there should be no fee limitation of any kind. Such arguments, however, must be addressed to Congress rather than to the courts.[43]

[43] See, *e.g.*, *United States* v. *Lorenzetti*, No. 83-838 (May 29, 1984), slip op. 11; *Hodel* v. *Indiana*, 452 U.S. 314, 333 (1981);

The constitutional issue in this case is not the wisdom of Congress's action, nor "whether Congress could have done a better job." *Regan* v. *Time, Inc.*, No. 82-729 (July 3, 1984), slip op. 13 (Stevens, J., concurring in part and dissenting in part); see also *Schall* v. *Martin*, No. 82-1248 (June 4, 1984), slip op. 27. "A wise public policy * * * may require that higher standards be adopted than those minimally tolerable under the Constitution." *Lassiter*, 452 U.S. at 33. Insofar as there is dissatisfaction and disagreement over the policy of the fee limitation, that is a matter for Congress. "The Constitution presumes that * * * even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *Vance* v. *Bradley*, 440 U.S. at 97 (footnote omitted). In the end, "Congress which creates and sustains [administrative] agencies must be trusted to correct whatever defects experience may reveal." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. at 146.

In fact, the history of the fee limitation "shows that the political system is working." *Vance* v. *Bradley*, 440 U.S. at 97 n.12. As noted above, Section 3404(c) has recently been under active consideration by Congress, which thus far has declined to eliminate or amend the fee limit.[44] Moreover, many of the criticisms asserted by

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Harris v. *McRae*, 448 U.S. 297, 325-326 (1980); *Bell* v. *Wolfish*, 441 U.S. 520, 542 n.25 (1979); *Hurtado* v. *United States*, 410 U.S. 578, 591 (1973); *James* v. *Strange*, 407 U.S. 128, 133 (1972); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-262 (1964).

[44] In addition, although declining to alter the fee limitation, Congress has not been unmindful of the concerns expressed by appellees. For example, Congress recently enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 *et seq.*, which requires the VA to pay veterans' benefits on an interim basis for certain skin and liver diseases possibly caused by Agent Orange, to evaluate studies of the health effects of exposure to dioxin and radiation,

appellees have been presented to and rejected by Congress over the past 120 years. For example, appellees complain that the fee limit is paternalistic and deprives veterans of the opportunity to decide for themselves whether to hire counsel; the same concern has been voiced to Congress, including at the time a fee limitation was first enacted in 1862.[45] It also has been argued in Congress, as appellees argue here, that some veterans may not be able to establish their claims without the assistance of retained counsel.[46] Similarly, the contention—reiterated by appellees—has been advanced in Congress that the fee limit is too strict and that a greater fee would be appropriate in cases of unusual difficulty or complexity that require additional time and effort.[47] And it has been urged in Congress, just as appellees urge in this case, that the VA procedure is adversarial in

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and to publish regulatory guidelines for compensating veterans for disabilities resulting from such exposures in service; the Act also creates an independent scientific panel to advise the VA about the relation between health problems and herbicides or radiation. As Congress declared in Section 3 of the Act (98 Stat. 2727):

> The purpose of this Act is to ensure that Veterans' Administration disability compensation is provided to veterans who were exposed during service in the Armed Forces * * * to a herbicide containing dioxin or to ionizing radiation * * * for all disabilities arising after that service that are connected, based on sound scientific and medical evidence, to such service * * *.

[45] See, *e.g.*, Cong. Globe, 37th Cong., 2d Sess. 3119 (1862) (remarks of Sen. Foster); 7 Cong. Rec. 4840 (1878) (remarks of Sen. Conkling); 22 Cong. Rec. 2185 (1891) (remarks of Sen. Cockrell).

[46] See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 4459 (1870) (remarks of Sen. Buckingham); 7 Cong. Rec. 4840 (1878) (remarks of Sen. Conkling); *id.* at 4841 (remarks of Sen. Spencer, Sen. Conkling, and Sen. Christiancy); 56 Cong. Rec. 5223, 5225 (1918) (remarks of Rep. Juul).

[47] See, *e.g.*, Cong. Globe, 41st Cong., 2d Sess. 4459 (1870) (remarks of Sen. Edmunds and Sen. Thayer); 22 Cong. Rec. 2176 (1891) (remarks of Sen. Hawley); *id.* at 2188 (remarks of Sen. Cockrell).

nature, that the VA seeks to oppose claims for benefits, and that the assistance provided to veterans in the administrative process is inadequate.[48] In each instance, Congress has rejected that view and refused to disturb the fee limitation. Especially in light of Congress's century-long experience with Section 3404(c), the continued viability of that provision should be left to the legislative arena. See Baldridge v. Shapiro, 455 U.S. at 361.

III. SECTION 3404(c) DOES NOT VIOLATE A FIRST AMENDMENT RIGHT TO MEANINGFUL AND EFFECTIVE ACCESS TO THE VA PROCESS

The district court also held that Section 3404(c) violates appellees' First Amendment rights of association and speech and to petition for a redress of grievances. This ruling is plainly in error, and the line of decisions

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[48] See, *e.g.*, 7 Cong. Rec. 4841 (1878) (remarks of Sen. Conkling); 22 Cong. Rec. 2179 (1891) (remarks of Sen. Platt); 56 Cong. Rec. 5225 (1918) (remarks of Rep. Dewalt); 65 Cong. Rec. 7862 (1924) (remarks of Sen. Oddie); *id.* at 11013 (remarks of Rep. Newton).

[49] For the reasons stated in our motion to affirm (at 8-9) in *Gendron* and in our brief in opposition (at 5 & n.8) in *Demarest* (a copy of which was previously sent to counsel for appellees), we also submit that initial applicants for VA benefits (as distinguished from current recipients) do not have a property interest protected by the Due Process Clause. Nevertheless, we do not press that argument here. First, for the reasons already discussed, we believe that the VA system affords due process and therefore is valid even assuming that a property interest is implicated. Moreover, it appears that at least one of the individual appellees was an actual recipient whose benefits were sought to be reduced (see J.S. App. 3a), and presumably the organizational appellees include others who are in the same position; in light of this circumstance, the Court will have to resolve the constitutional adequacy of the VA system regardless of whether initial applicants for benefits have a protectable property interest. Accordingly, the Court need not decide in this case the question of an initial applicant's property interest in requested veterans' benefits.

upon which the district court relied is inapposite.[50] Nothing in the First Amendment suggests that the fee limitation is unconstitutional because it restricts a claimant in hiring a private lawyer where other, adequate representation is available without charge.[51]

In our view, this case does not present a First Amendment issue that is separate and independent from the due process question. The First Amendment decisions cited by the district court rest on the need for "effective" and "meaningful" representation. *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 584-585 (1971).[52] Since, as demonstrated above, the existing VA claims procedure is fair and adequate without privately retained attorneys, there is no basis in the First Amendment for inferring a right to counsel as necessary to effectuate the freedoms of association, speech, and petition for redress. Nor does the First Amendment guarantee of meaningful access entail an absolute right to be assisted by the individual representative of one's choosing. Cf. *Morris* v.

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[50] See *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576 (1971); *United Mine Workers* v. *Illinois Bar Ass'n*, 389 U.S. 217 (1967); *Brotherhood of Railway Trainmen* v. *Virginia Bar*, 377 U.S. 1 (1964); *NAACP* v. *Button*, 371 U.S. 415 (1963).

[51] The district court's ruling is also inconsistent with *Staub* v. *Roudebush*, 424 F. Supp. 1346, 1349 (D.D.C. 1976), vacated for lack of standing, 574 F.2d 637 (D.C. Cir. 1978) (Table). See also *Hoffmaster* v. *Veterans Administration*, 315 F. Supp. 62, 64-65 (E.D. Pa. 1970), aff'd, 444 F.2d 192 (3d Cir. 1971).

[52] See also *In re Primus*, 436 U.S. 412, 426 (1978) (citation omitted) (" 'collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment' "); *Bates* v. *Arizona Bar*, 433 U.S. 350, 376 n.32 (1977); *Roberts* v. *United States Jaycees*, No. 83-724 (July 3, 1984), slip op. 7 (O'Connor, J., concurring); *Minnesota Bd. for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 10 & n.11 (Stevens, J., dissenting).

Slappy, 461 U.S. 1 (1983); *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463 (1979).[53]

In addition, Section 3404(c) does not prevent veterans from associating together or petitioning the VA for redress. Nor does it prevent veterans' organizations from furnishing supporting services to veterans, including legal advice and representation.[54] The only proviso is that any fee charged a veteran in connection with a claim not exceed $10. In view of the extensive associational and support activity that is unfettered, the fee limitation does not infringe the First Amendment. Cf. *Minnesota Bd. for Community Colleges* v. *Knight*, No. 82-898 (Feb. 21, 1984), slip op. 16-18.[55]

---

[53] For example, the First Amendment surely would not require that "a group * * * [must be allowed to] employ a layman to represent its members in court or before an agency because it felt that his low fee made up for his deficiencies in legal knowledge." *United Mine Workers* v. *Illinois Bar*, 389 U.S. at 228 (Harlan, J., dissenting).

[54] Indeed, appellee Swords to Plowshares retains attorneys to represent claimants without charge. See Declaration of Thomas A. Verrill (Apr. 15, 1983), and Declaration of Charles C. Coyle (Apr. 15, 1983), which were filed in the district court as part of the government's opposition to the plaintiffs' request for early discovery.

[55] In *United Transportation Union* v. *Michigan Bar*, *supra*, the Court declared unconstitutional a state restriction on a union's ability to limit the fees charged its members by lawyers it recommended (401 U.S. at 577-578, 584); as the Court stated, "[i]t is hard to believe that a court of justice would deny a cooperative union of workers the right to protect its injured members, and their widows and children, from the injustice of excessive fees at the hands of inadequate counsel" (*id.* at 585). Likewise, in *United Mine Workers* v. *Illinois Bar*, *supra*, the Court stated that the First Amendment protected a union program that provided legal assistance without charge to the union member, thus ensuring that "[t]he full amount of any settlement or award is paid directly to the injured member. The attorney receives no part of it" (389 U.S. at 221). As previously discussed, similar considerations underlie the fee limitation in Section 3404(c).

Finally, the cases advanced for a contrary constitutional rule have no application here. Each of those cases involved a contested and adversarial process in which the assistance of counsel was clearly required in order adequately to pursue the legal rights involved. As the Court explained in *Brotherhood of Railway Trainmen* v. *Virginia Bar*, 377 U.S. 1, 7 (1964), a state cannot

> infringe in any way the right of individuals * * * to be fairly represented in lawsuits authorized by Congress to effectuate a basic public interest. Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries * * *. The State can no more keep these workers from using their cooperative plan to advise one another than it could use more direct means to bar them from resorting to the courts to vindicate their legal rights.

Furthermore, in those cases it was unquestionably permissible for the claimant to retain an attorney to prosecute his cause; the only issue was the authority of the state, acting pursuant to its power to regulate the practice of law, to interfere with the claimant's exercise of that right by, for example, restricting information bearing on his decision. In contrast, Section 3404(c) must be judged in the context of the informal and nonadversarial VA process in which service organizations provide expert representation for free, and it is justified by legitimate and substantial interests that are entirely unrelated to any attempt to impair the claimant's informed exercise of his procedural rights. Accordingly, the fee limitation in Section 3404(c) is a far cry from the situations that this Court has previously addressed, and the decisions relied on by the district court do not undermine the constitutional validity of that longstanding congressional policy.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JANUARY 1985

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In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOINT APPENDIX

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JURISDICTIONAL STATEMENT FILED OCTOBER 9, 1984
PROBABLE JURISDICTION NOTED DECEMBER 10, 1984

Volume I

BEST AVAILABLE COPY

In the Supreme Court of the United States

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TABLE OF CONTENTS OF APPENDIX*

	Page
Relevant District Court Docket Entries	1
Complaint For Declaratory And Injunctive Relief, with Exhibits A through K, April 13, 1983.....	18
Memorandum Decision And Order denying defendants' motion to dismiss, October 21, 1983	97
Declarations and Affidavits:	
Declaration Of Walter R. Atlee, August 19, 1983...	122
Declaration Of Clarence William Autrey, September 24, 1983	126
Affidavit Of Ronald G. Bakal, March 30, 1983.....	129

*The district court opinion, Order Re Modification, Notice To All Veterans And V.A. Claimants Regarding Hiring Of Attorneys, Order Re Posting Of Notice, notice of appeal from the preliminary injunction, and notice of appeal from the order re modification were attached as appendices to the jurisdictional statement and are not reproduced herein.

Affidavit Of Mary Baluss, with attachments (Affidavit Of Emanuel Staub and Affidavit Of Harold J. Nussbaum), July 1, 1983 131
Declaration Of James L. Bianchi, April 12, 1983 ... 139
Declaration Of John Burke, November 10, 1983 142
Declaration Of Don E. Cordray, with Exhibit A, July 14, 1983 146
Supplemental Declaration Of Don E. Cordray, November 9, 1983 152
Affidavit Of Howard J. De Nike, April 28, 1983 155
Declaration Of Glenn Dorfmeier, July 15, 1983 158
Declaration Of Charles E. Joeckel, Jr., with attachment, November 16, 1983 160
Declaration Of R. Charles Johnson, March 29, 1983 ... 170
Declaration Of Frederico Juarbe, Jr., November 17, 1983 173
Declaration Of Thomas McBee, November 7, [1983] .. 178
Delcaration of Eldon D. Praiswater, November 10, 1983 181
Declaration Of Leonard W. Schroeter, April 11, 1983 184
Declaration Of Malcolm C. Souness, November 15, 1983 187
Declaration Of Richard D. Standefer, November 18, 1983 190
Declaration Of Ralph C. Vaughan, November 16, 1983 192
Declaration Of Reason F. Warehime, with Exhibits A and B, July 13, 1983 195
Declaration Of Doris J. Wilson, July 15, 1983 216

Depositions:

Excerpts from Deposition Of Wesley J. Hawke:
[Volume I], October 24, 1983 219
Volume II, November 3, 1983 226
Excerpts from Deposition Of Thomas H. Jacobson:

Volume I, October 21, 1983 253
Volume II, October 24, 1983 281
Volume III, November 2, 1983 297
Excerpts from Deposition Of Albert Maxwell, June 14, 1983 307
Excerpts from Deposition Of Richard B. Standefer:
Volume I, June 15, 1983 330
Volume II, June 16, 1983 345
Excerpts from Deposition Of Thomas A. Verrill:
Volume I. May 3, 1983 370
Volume II, May 6, 1983 386
Volume III, June 17, 1983 401
Volume IV, June 21, 1983 420
Volume V, July 8, 1983 430
Volume VI, July 11, 1983 434
Excerpts from Deposition Of Max R. Woodall:
Volume I, June 23, 1983 435
Volume II, June 24, 1983 464

Exhibits:

2—Form letter sent by Northern California Regional Office to unrepresented claimants who request hearings 507
4—Agent Orange Claims, November 1, 1982..... 509
9—New Adjudication Work-Rate Standards, effective October 1, 1981 510
17—Excerpts from Verrill's Personal Copy of V.A. Adjudication Manual-M21-1 511
46—Radiation Exposure Claims—Disposition At Regional Offices, March 1, 1983 515
47—Board Of Veterans Appeals Radiation Cases, October 22, 1981 516
48—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), First Quarter, Fiscal Year 1983, March 23, 1983 .. 517

49—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), Fiscal Year 1982, March 18, 1983 518
56—Board Of Veterans Appeals—Disposition of Appeals Involving Agent Orange, Fiscal Year 1982, March 18, 1983 519
57—Agent Orange Claims, March 1, 1983 520
58—Herbicide Exposure Claims, June 2, 1980 521
60—Appeals Statistical Data—Board Of Veterans Appeals, March 28, 1981 522
62—Don E. Cordray's VA Appeal Form 1-9 (Substantive Appeal) 523
63—Board Of Veterans Appeals—Disposition of Appeals by Type of Hearing, Fiscal Year 1982, January 11, 1983 525
64—Undated letter to Reasons Warehime from T.A. Verrill, VA Adjudication Officer, re: waiver of personnel hearing 526
65—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing In Fiscal Year 1982 527
66—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing in Fiscal Year 1977 528
67—Excerpt—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, 10/1/81-9/30/82 529
68—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, Fiscal Year 1977 530
69—Board of Veterans Appeals—Travel Boards Representation In Appealed Cases (includes Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976) 535
70—Excerpts from Chapter II, "The Special Legal Problems and Special Difficulties of Access of Veterans" of the Legal Services Corporation Report To Congress On Access Of Veterans To Legal Assistance, with attachments 542
74—Excerpt—Average Length, In Minutes, Of Claimant Hearings Before the BVA 573
75—Board Of Veterans Appeals—Overall Representation (including Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976) 574
76—Disposition of Veteran Administration Claims On Appeal, 10/1/81—9/30/82, with Exh. L ... 582
77—Total BVA Cases in 1982 = 35,758, with Exh. J 584
78—BVA Representation In Appealed Cases, 10/80-9/81, with attachment 587
99—Excerpts from VARMS Report "PVAR25"—VA Data Processing Center Printout Re: Disposition by Reasons-Quarterly and Cumulative, May 5, 1983 589
101—Questions Presented from the Jurisdictional Statement in *Gendron* v. *Levi*, 423 U.S. 802 (1975) 598
115—Letter to Doris J. Wilson from Jack A. Collier, VFW Department Service Officer, re: Personal Hearing, May 26, 1982 599
124—Board Of Veterans Appeals—Informal Hearing Presentation, April 13, 1983 600
126—Excerpts from defendant's letter to Gordon Erspamer, re: supplemental response to plaintiff's first set of interrogatories, July 15, 1983 602
153—Statement Of Accredited Representative In Appealed Case (name withheld), re: Agent Orange, July 8, 1982 606
154—Statement In Support Of Claim (name withheld), re: PTSS Claim, December 9, 1981 .. 607
157—Statement In Support Of Claim (name withheld), re: Agent Orange Claim, July 15, 1981 608

173—VA letter to claimant (name withheld) denying claim for radiation exposure, August 28, 1978 609

177—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26489948), April 20, 1983 610

178—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26375945), February 23, 1972 611

180—Exhibits to Jacobson Deposition—Appointment Of Veterans Service Organization As Claimant's Representative, September 5, 1979 and Statement In Support Of Claim, June 30, 1975 re: Radiation (Claim File No. 26705288)..... 612

181—Exhibits to Jacobson Deposition—Statements In Support Of Claim, re: Radiation (Claim File No. 23396989), August 2, 1982 616

194—Exhibits to Jacobson Deposition—Letters to Dan Forest, Disabled American Veterans, December 5, 1980 and to M.H. Tallen, VA Adjudication Officer, December 12, 1980, re: withdrawal of Power of Attorney from DAV (Radiation—Claim File No. XC-5646292) ... 622

Miscellaneous:

Exhibit A to Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction 625

Letter to Mylio S. Kraja, Executive Director of American Legion from John P. Murphy, VA General Counsel, introduced into evidence at 12/1/83 Hearing, re: Preliminary Injunction, September 27, 1983 628

Excerpts from Hearing Transcript, re: Preliminary Injunction, December 1, 1983 631

Order noting probable jurisdiction 634

NATIONAL ASSOCIATION OF RADIATION SURVIVORS,
A CALIFORNIA NON-PROFIT CORPORATION;
SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION,
A CALIFORNIA NON-PROFIT CORPORATION;
DON E. CORDRAY, AN INDIVIDUAL;
ALBERT R. MAXWELL, AN INDIVIDUAL;
REASON F. WAREHIME, AN INDIVIDUAL;
DORIS J. WILSON, AN INDIVIDUAL, PLAINTIFFS,

v.

HARRY N. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION;
THE UNITED STATES OF AMERICA;
THE VETERANS ADMINISTRATION;
PAUL D. ISING, DIRECTOR, SAN FRANCISCO REGIONAL OFFICE, THE VETERANS ADMINISTRATION,
DEFENDANTS.

---

38 USC 3404-3405: Challenge to its Constitutionality under the First and Fifth Amendments

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1983

Apr 13 1 COMPLAINT: summons issued.

2 Plaintiffs' Ex Parte Motion for Expedited Discovery, Order Shortening Time and Order Fixing Place of Deposition.

3 —Memorandum of Points and Authorities in Support of #2.

4 —Affidavit of Michael F. Ram in Support of #2.

RECEIVED: Proposed Order granting #2.

5 Plaintiffs' First Request to Produce Documents for Inspection and Copying.

6 ORDER setting Status Conference: 7/25/83 at 9:30 am. Clerk

18 7 Letter from Plaintiff's counsel re Plaintiffs to present Motion for Order Expediting Discovery, Shortening Time and Fixing Place of Deposition to MHP on 4/21/83 at 9:30 am.

19 8 Defendants' Opposition to Early Discovery and Counter-motion for a Protective Order.

RECEIVED: Proposed Order Staying Discovery.

9 Plaintiffs' Proof of Service for #2, #3, #4, #5, and #6, upon Defendants, by personal delivery on 4/13/83.

21 10 MINUTES; (c/r Vivian Pella) Plaintiff's Motions for Order Expediting Discovery, Shortening Time & Fixing Place of Deposition heard.

Discovery Schedule:

5/16/83—Response to remaining outstanding document request.

10 days later—any discovery re any supplemental written request. Declaration necessary.

4/28/83—document addressing those issues due.

5/5/83—Government response due.

6/3/83—Deposition to begin.

26 11 ORDER Regarding Discovery Schedule: Defendants to respond to Plaintiff 1st Set of Interrogatories by 5/16/83. Plaintiff's may make supplemental request for production of documents. Depositions of T.A. Verrill and Puuaul Ising to commence 6/3/83. Plaintiffs to file declaration by 4/28/83 designating VA officials who must be deposed. Defendants to file by 5/5/83 response to Plaintiff's declaration re VA officials to be deposed. MHP

28 12 Plaintiffs' Supplemental Declaration of Gordon P. Erspamer in Support of Plaintiffs' Motion for Expedited Discovery, Order Shortening Time and Order Fixing Place of Deposition.

May 2 13 Summons on Return: executed on 4/13/83, to U.S. Atty, personal service

14 Summons on Return: executed, 4/13/83, to Lynn Pierce, Personal service

15 Summons on Return: executed, 4/13/83, U.S. Atty, S.F., by mail.

May 11 17 Defendant U.S.'s Respons to the Second Erspamer Declaration.

16 18 Federal Defendant's Notice of Motion to Dismiss: 6/13/83 at 10:30 am.

19 —Brief in Support of Motion to Dismiss.

20 —Declaration in Response to Plaintiff's First Request to Produce Documents for Inspection and Copying.

21 Plaintiffs' First Seto of Interrogatories to All Named Defendants.

18 22 Clerk's Notice: Federal Defendant's Motion to Dismiss rescheduled from 6/13/83 to 6/20/83 at 10:30 am.

19	23	Plaintiffs' Application for Enlargement of Time for the Hearing of Defendants' Motion to Dismiss.
	24	—Memorandum of Points and Authorities in Support of #23.
	25	--Declaration of Michael F. Ram in Support of #23.
		RECEIVED: Proposed Order granting #23.
May 20	26	ORDER re Motion for Expedited Discovery and Order Fixing Place of Deposition: Plaintiffs' may take Depositions of VA Officials Phillips and Standefer in mid to late June in San Francisco. Plaintiffs' request to depose Woodall and Eaton denied without prejudice. MHP
24	27	Defendant's Letter to Clerk confirming hearing on Plaintiffs' Motion for Enlargement of Time set for 5/27/83 at 1:30 pm.
26	28	Defendants' Opposition to Plaintiffs' Motion to Delay the Defendants Motion to Dismiss.
		RECEIVED: Proposed Order denying Plaintiffs' Motion to Delay Defendants Motion to Dismiss.
27	29	MINUTES: (c/r Carl Pline) Continuation of Motion to Dismiss granted. Motion rescheduled from 5/20/83 to 8/1/83 at 10:30 am. Status of 7/25/83 vacated. MHP
Jun 1	30	Plaintiff's Notice of Taking Depositions: Dean K. Phillips, 6/13/83; Richard B. Standefer, 6/15/83.
		RECEIVED: Proposed Order re Plaintiffs' Application for Enlargment of Time for the Hearing of Defendants' Motion to Dismiss.

Jun 7	31	Plaintiffs' Notice of Taking Deposition: Albert R. Maxwell, 6/14/83. Proof of Service attached.
8	32	Plaintiffs' Motion for Order of Deposition of Max R. Woodall and Order Fixing Place of Depositions.
	33	—Memorandum of Points and Authorities in Support of #32.
	34	—Declaration of Gordon P. Erspamer in Support of #32.
		RECEIVED: Proposed Order granting #32.
9	35	Plaintiff's Application (ex parte) for Order Shortening Time.
	36	—Declaration of Gordon P. Erspamer in Support of #35.
	37	ORDER: #35 granted. Plaintiff's Motion for Order of Deposition of Max R. Woodall and Order Fixing Place of Deposition to be heard at 10:00am on 6/14/83.
	38	Plaintiff's Notion of Motion for Order of Deposition of Max R. Woodall and Order Fixing Place of Deposition: 6/14/83 at 10:00am.
10	39	Plaintiffs' Proof of Service by Mail: Order to Show Cause, to Jack Nagan and Edward J. Lukey, executed 6/10/83.
13	40	Defendants' Applicaiton for Order Shortening Time: 6/14/83 at 9:30 am.
	41	—Notice and Motion to Reconsider the Court Ordered Deposition of Dean Phillips.
	42	—Opposition to Proposed Deposition of Max Woodall.
	43	ORDER Shortening Time: #41 to be heard 6/14/83 at 11:00 am.
		RECEIVED: Proposed Order stating that Depositicns of Woodall and Phillips need not be taken.

14	44	MINUTES: (c/r Vivian Pella) Plaintiff's Motion for Order of Deposition of Max R. Woodall, granted. Defendant Motion for Reconsideration of Deposition of Dean Phillips—court requests further declarations within a week. Deposition of Phillips stayed. MHP
14	45	ORDER: Plaintiffs' Application for Enlargement of Time for Hearing of Defendants' Motion to Dismiss granted: Plaintiffs' opposition due 7/18/83; Defendant's reply due 7/25/83; Hearing 8/1/83 at 10:30am. Status Conference of 7/25/83 is vacated. Parties to agree on dates of depositions to be taken. MHP
Jun 20	46	Defendants' Answers to Plaintiffs' First Set of Interrogatories.
21	47	Federal Defendants' Affidavit of George C. Stoll.
	48	Plaintiffs' Memorandum of Points and Authorities in Opposition to Motion to Reconsider Order Fixing Deposition of Dean K. Phillips.
	49	—Declaration of Michael F. Ram in Support of #48.
		RECEIVED: Proposed Order Denying Defendants' Motion to Reconsider Order Fixing Deposition of Dean K. Phillips.
	50	ORDER: Plaintiffs may take the deposition of Max R. Woodall in San Francisco no later than 6/30/83. MHP
27	51	ORDER: Plaintiff's are not entitled to depose Dean K. Phillips in S.F. at the expense to the defendant/s. MHP
28	52	Federal Defendants' Amended Affidavit of George C. Stoll.
Jul 12	53	Defendants' Answers to Plaintiffs' First Set of Interrogatories.

	54	Plaintiffs' Application for Leave of Court to File Brief in Excess of 25 Pages.
	55	—Declaration of Michael F. Ram in Support of #55.
13	56	ORDER: Plaintiffs may file brief not to exceed 50 pages in opposition to Defendants' Motion to Dismiss. MHP
15	57	Federal Defendants' Position re Proposed Oversize Brief and Countermotion to Extend Time.
	58	—Affidavit of George Christopher Stoll.
		RECEIVED: Proposed Order extending defendant's Time to Respond to oversized brief.
Jul 19	59	Plaintiff's Memo in opposition to defendants' motion to dismiss 8-1-83 10:30 am
19	60	Plaintiff's Exhibits to opposition to motion to dismiss
19	61	Plaintiff's Declaration of Gordon P. Erspamer in support of opposition to motion to dismiss
19	62	Plaintiff's exhibits to declaration of Gordon P. Erspamer re dismiss Exhibit B
19	63	Plaintiff's exhibits to declaration of Gordon P. Erspamer re dismiss Exhibit A
Jul 19	64	Plaintiff's Declaration of Michael F. Ram re opposition to motion to dismiss Exhibit A
19	65	Plaintiff's Affidavits & Declarations to opposition to motion to dismiss 8-1-83 10:30 am
19	66	Plaintiff's Declarations to opposition to motion to dismiss (Attorneys)
19	67	Plaintiff's Affidavits (Attorneys) to opposition to motion to dismiss
19	68	Plaintiff's Exhibits to Declaration of Gordon P. Erspamer in opposition to motion to dismiss, exhibit C

19	69	Plaintiff's Exhibits to Declaration of Gordon P. Erspamer re opposition to dismissal, Exhibit B
19	70	Plaintiff's Exhibits to opposition to motion to dismiss #167...
19	71	Plaintiff's Exhibits to opposition to motion to dismiss #20 to 45
19	72	Plaintiff's Exhibits to opposition to motion to dismiss #2-14
19	73	Plaintiff's Exhibits to opposition to motion to dismiss #46-70
19	74	Plaintiff's Exhibits to opposition to motion to dismiss #95-103
19	75	Plaintiff's Exhibits to opposition to motion to dismiss #104-126
19	76	Plaintiff's Exhibits to opposition to motion to dismiss #150-166
19	77	Plaintiff's Exhibits to opposition to motion to dismiss #16-17
19	78	Plaintiff's Exhibits to opposition to motion to dismiss #18-19
21	79	Defendants supplemental affidavit of G. Christopher Stoll in support of motion to extend time
22	80	Plaintiff's Declaration of Kathleen V. Fisher in Opposition to Defendant's Motion to Extend Time.
25	81	Defendants' Reply Re Extension of time.
Aug 2	82	Defendants' Reply Brief.
Aug 3	83	Defendants' Table of Authorities to Defendants' Brief.
	84	-Verification of Exhibits.
19	85	Defendant, Max R. Woodall's Affidavit.
	86	-James J. Derhaag's Affidavit.
	87	-Max R. Woodall's supplemental affidavit.
	88	James J. Derhaag's supplemental affidavit.
22	89	Plaintiff's Declaration of Walter R. Atlee.

	90	MINUTES: motion to dismiss denied. Case continued to 12-5-83 @ 10:30 a.m. for motion for preliminary injunction.
24	91	Plaintiff's Proofs of service Re declaration of Walter R. Atlee returned executed as to Jack Nagan & Edward J. Lukey 8/22/83.
Sep 26	92	Defendants' notice of objection to request for production and discovery
	93	Plaintiff's third request to produce documents for inspection and copying.
30	94	Plaintiff's request for recording & maintenance of statistical information, notice of intent to request court to draw adverse inference at trial.
Oct 3	95	Defendants' response to plaintiffs' third request to produce document for inspection & copying.
	96	-affidavit of Stoll.
5	97	Defendants' response to request for recording and maintance of statistical information.
12	98	Plaintiffs' notice of depositions of: C. Coyle, J. Yates, R. Polcari, T. Spindel, Jr., *D. Phillips (by Phone)*. All depositions except the underlined person shall be in person. No issued.
	99	Defendants' motion to stay discovery. A hearing date not listed.
13	100	Defendants' application for order shortening time.
	101	-declaration of G. Stoll
	102	ORDER: defendants' motion to stay discovery will be heard on 10-17-83 @ 10:30 a.m. (See order filed herein) Plaintiffs' opposition shall be filed & hand-delivered by 10-14-83 @ 2:00 p.m. Entered 10-14-83 MHP
	103	ORDER: re discovery (See order) Entered 10-14-83 MHP

104 Plaintiffs' declaration of G. Erspamer in opposition to defendants' motion for a stay of discovery.

14 105 Plaintiffs' notice of motion for leave of court to file first amended complaint & to compel production of documents.

17 106 Defendants' opposition to application for TRO.

107 MINUTES: case continued to 10-18-83 @ 9:00 a.m. for motion to amend complaint, and plaintiff motion for TRO. C/R S. Thompson MHP

18 108 MINUTES: Plaintiff's motion to amend complaint granted. Plaintiff's motion for TRO denied. Case continued to 12-5-83 @ 10:30 for preliminary injunction. C/R S. Thompson MHP

109 Plaintiff's supplemental declaration of M. Blecker in support of a TRO.

110 Plaintiff's supplemental declaration of E. Anello in support of a TRO.

111 Plaintiff's FIRST AMENDED COMPLAINT

19 112 Defendants' response to plaintiffs' third request to produce document for inspection & copying.

21 113 MEMORANDUM DECISION & ORDER: Defendant's motion to dismiss is denied (see orginial order) Entered 10-21-83 MHP

24 114 Plaintiff's prior supplemental document request.

115 ORDER: Plaintiff's motion for leave to amend complaint granted. Plaintiff's application for TRO is denied without prejudice. Plaintiff motion for preliminary injunction will be heard on 12-5-83. (See orginial order for particulars) Entered 10-24-83 MHP

26 116 Plaintiffs' notice of entry of order granting leave to file first amended complaint, directing production of documents and taking of deposition, and denying temporary restraining order without prejudice and entry of memo decision and order.

117 Defendant letter to Courtroom deputy re: reschedule of preliminary injunction hearing.

Oct 31 118 Plaintiffs' notice of motion & motion to compel production of document and compel answers to deposition question & request for sanctions. set for 10-31-83 @ 10:30 a.m.

119 -memo of points & authorities in support of #118.

120 -declaration of G. P. Erspamer in support of #118

121 -certificate of compliance.

122 -ex parte application for order shortening time.

123 ORDER: plaintiffs' ex parte application for order shortening time is granted. Plaintiffs' motion to compel production of documents & answers to deposition question and request for sanctions shall be heard at 2:00 p.m. on Tuesday 11-1-83. Entered 10-31-83 MHP

Nov 1 124 Defendants opposition to motion to compel deposition answers.

125 -affidavit of G. C. Stoll.

126 -affidavit of G. C. Stoll.

127 -affidavit of G. C. Stoll.

2 128 MINUTES: plaintiff's motion to compel production of documents & answers to deposition question and request for sanctions (OST) granted. C/R V. Pella MHP

*		129	Plaintiff/Intervenor's notice of motion to intervene as a plaintiff
		130	-declaration of R. L. Gnaizda
		131	-application for and order shortening time for hearing on applicant's motion to intervene.
			Received complaint in intervention.
			Received order granting leave of court to intervene as plaintiff.
		132	ORDER: plaintiffs' motion to compel production of documents and answers to deposition question is granted. Defendants shall produce a response to plaintiffs' third request to produce documents for inspection and copying 1,2, & 10 by 11-9-83. Defendants shall pay plaintiffs the sum of $500.00 for their expenses incurred no later than 12-31-83. Entered 11-8-83 (See original order) MHP
		133	STIPULATION & ORDER: dismissing fifth claim for relief without prejudice. Entered MHP
Nov	8	134	Plaintiff/Intervenor's certificate of service.
		135	Defendants declaration of G. Stoll.
		136	-application to strike application for order shortening time and to amend the court order.
	10	137	ORDER: The order shortening time is vacated and counsel for intervenors to fully comply with local rule 220-10(f) in all future request for orders shortening time. Entered 11-15-83. MHP
	14	138	Defendants' response to third request for production of documents.
		139	Plaintiffs' notice of application for a preliminary injunction, set for 11-28-83 @ 11:00 a.m.

		140	-memo of points and authorities in support of #139
		141	-affidavit and declaration of attorneys and claimants re: #139
		142	EXCERPT from Vol I of the Deposition of T. Verrill 5-6-83
		143	DEPOSITION OF T. VERRILL 5-6-83 Vol II.
*	15	144	DEPOSITION OF A. MAXWELL 6-14-83, with attached exhibits.
		145	DEPOSITION OF T. JACOBSON, 10-21-83 Vol. I, with attached exhibits.
*	14	146	DEPOSITION OF R. STANDEFER, 6-15-83, Vol I, with attached exhibits.
		147	EXCERPT from Vol I, of the Deposition of R. Standefer 6-15-83.
	15	148	DEPOSITION OF W. HAWKE, 10-24-83, with attached exhibits.
		149	DEPOSITION OF D. PHILLIPS, 11-1-83, with attached exhibits
		150	DEPOSITION OF R. POLCARI, 10-19-83.
		151	DEPOSITION OF T. JACOBSON, 10-24-83, Vol. II
		152	DEPOSITION OF T. JACOBSON, 10-24-83, Vol. III, with attached exhbits
*	14	153	DEPOSITION OF M. WOODALL, 6-23-83, Vol I
	15	154	DEPOSITION OF M. WOODALL, 6-24-83, Vol II, with attached exhibits.
		155	DEPOSITION OF W. HAWKE 11-3-83, Vol II, with attached exhibits.
*	14	156	DEPOSITION OF R. Standefer, 6-16-83, Vol II, with attached exhibits. SEE SHEET "E"
Nov	14	157	DEPOSITION OF T. VERRILL, 5-3-83, Vol I
		158	DEPOSITION OF T. VERILL, 6-17-83, Vol III, with attached exhibits.

159 DEPOSITION OF T. VERRILL, 6-21-83, Vol IV, with attached exhibits.
160 DEPOSITION OF T. VERRILL, 7-8-83, Vol V, with attached exhibits.
161 DEPOSITION OF T. VERRILL, 7-11-83, Vol VI, with attached exhibits.
162 Plaintiff's proof of service.
163 Deposition exhibits to T. Verrill 6-3-83 & 6-6-83.
164 Deposition exhibits to T. Verrill 6-3-83 & 6-6-83.
165 Deposition exhibits to T. Verrill 6-3-83 & 6-6-83.
166 DEPOSITION OF S. KETCHUM, M.D., 9-26-83.

Nov 16 167 Plaintiffs' Declaration, Ralph C. Vaughan, Hearing date, 11/28/83, 11:00 a.m.
Exhibit A & B, attached.
168 Declaration, Malcolm C. Souness, Hearing date, 11/28/83, 11:00 a.m.
169 Defendants' Affidavit, Harry N. Walters, Asserting Deliberative Process Privilege.
170 *ORDER*-Granting Leave of Court to American G. I. Forum, to Intevene as Plaintiff. MHP
171 COMPLAINT IN INTERVENTION: No Process., by, American G. I. Forum.

Nov 14 172 Letter, dated 11/10/83, to George Christopher Stoll, from C. Kerosky.

Nov 16 173 Defendants' Opposition to Motion to Intervene.

Nov 17 174 *MINUTE ORDER*—(11/16/83) (C/R: Susan Thomson, 524-4576) re: Applicant, American G. I. Forum Motion to Intervene (OST)—Granted; provided currently set dates remain unchanged. Complaint-In-Intervention deemed filed as of today. MHP

Nov 18 175 ORDER FOR PRETRIAL PREPARATION: Trial date—6/5/84 at 9:30 am. Pretrial Conference—4/9/84 at 10:30 am. Pretrial statements due 3/26/84. MHP

21 176 Defendants' Closing Brief.

23 177 Defendants' Notice of in Camera Production of Documents.

178 Plaintiffs' Memorandum of Points and Authorities in Reply to Defendants' Opposition to Application for a Preliminary Injunction.

30 179 Plaintiffs' Declaration of Michael A. Blecker in Support of Application for Preliminary Injunction: 12/1/83 at 2:30 pm.

180 -Supplemental Declaration of Michael F. Ram in Support of Application for a Preliminary Injunction.

181 ORDER: Letters reviewed *in camera* shall not be produced. Defendants shall not use letters as evidence in support of their opposition to the motion for preliminary injunction or they shall be produced for plaintiffs. MHP

Dec 2 182 Defendant's Letter to Mylio S. Kraja, Executive Director of the American Legion requesting aid in defense against this claim.

* 1 183 MINUTES: (C/R Vivian Pella) Plaintiff's Motion for Preliminary injunction, submitted MHP

19 184 Federal Defendant's Supplemental Authorities.

27 RECEIVED: Stipulation and Proposed Order allowing defendants an additional 10 days in which to pay sanctions.

1984

Jan	4	185	STIPULATION AND ORDER: Defendants have thru 1/10/84 to pay or apply to court for relief from order of 11/8/83 awarding sanctions. RFP
	13	186	Defendant's ANSWER TO FIRST AMENDED COMPLAINT.
Jun	12	187	OPINION: Motion for preliminary injunctive relief is GRANTED (see Opinion) MHP
	13	188	Plaintiff's Notice of Entry of opinion
	20	189	Defendant's *Notice of Appeal* to the Supreme Court; No fee paid Pkg. given
Jun	25	190	Plaintiffs' Memo in Opposition to Defendants' Motion for Stay of Preliminary Injunction
		191	Defendants' Application for Order Shortening Time
		192	-Declaration in Support of Application for Order Shortening Time
		193	ORDER: Application for Defendants' order to Shorten time for motion for a Stay pending Appeal is GRANTED; Opposition papers due 6-26-84 MHP
		194	Defendant's Notice of Motion for Stay Pending Appeal (un-noticed)
		195	—Brief in Support of Motion for Stay Pending Appeal RECEIVED: Order
	26		RECEIVED: Proposed Order Re: Summary Judgment
			RECEIVED: Proposed Order Re: Preliminary Injunction
	27	196	MINUTES: (c/r V. Pella) Defendants' Motion for Stay Pending Appeal Order Shortening Time GRANTED IN PART & DENIED IN PART MHP
**	22	197	Plaintiffs' 1st set of Interrogatories to all named Defendants and 5th request for production of Documents

Jul	20	198	ORDER: Defendants shall post attached notice in every Veterans Administration Office where SSDC Claoms [sic] are adjudicated or appeals decided, Notice will be printed on 8-1/2 × 11 inch paper MHP
		199	ORDER: Re: Modification that defendants' motion for a Stay is GRANTED IN PART AND DENIED IN PART (see order) MHP
	23	200	Defendant's responses to Plaintiff's 2nd set of Interrogatories
Aug	20	201	-NOTICE OF APPEAL; Fee not required, Pkg. Given
	24		-mailed copy of Appeal to US Supreme Court
Sept	17	202	Plaintiff's 4th set of Interrogatories and 6th request for production

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF
(CAPTION OMITTED)

No. _____

Plaintiffs complain of defendants and each of them, and allege the following:

I
JURISDICTION AND VENUE

1. This is an action for declaratory and injunctive relief challenging the constitutionality of 38 U.S.C. §§ 3404 and 3405. This Court is vested with jurisdiction pursuant to 28 U.S.C. § 1346(a)(2) and 28 U.S.C. § 1331. This action arises under the Constitution of the United States and plaintiffs herein allege violations of the Fifth Amendment of the United States Constitution. Venue is proper under 28 U.S.C. § 1402(a) and 28 U.S.C. § 1391(e).

II
THE PARTIES

2. Plaintiff NATIONAL ASSOCIATION OF RADIATION SURVIVORS ("NARS") is a voluntary, non-profit corporation organized and existing under the laws of the State of California, whose central office is located in San Francisco, California. Its membership is comprised mainly of veterans and the families of veterans who participated in atomic bomb tests conducted by THE UNITED STATES OF AMERICA, and includes recipients of defendant THE VETERANS ADMINISTRATION ("V.A.") Death and Disability Compensation, as defined below, as well as potential claimants for the same. The purpose of NARS is to obtain health care, compensation and other benefits and necessities to which radiation survivors are entitled. Numerous NARS members have Death and Disability Compensation claims, as defined below, under 38 U.S.C. §§ 301 *et. seq.*, 401 *et. seq.* pending before the V.A. or the Veterans Administration Board of Veterans Appeals ("BVA"). Several other NARS members are existing recipients of V.A. Disability Compensation, as defined below, whose disability

ratings have been reduced or are being threatened with reduction by the V.A.

3. Plaintiff SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION (hereafter "SWORDS TO PLOWSHARES") is a non-profit corporation organized in 1974 and dedicated to serving the interests of United States veterans, and particularly Vietnam veterans, and to facilitating their continuing transition to civilian life. SWORDS TO PLOWSHARES conducts outreach programs to assist veterans in enhancing their job skills, seeking employment opportunities, and obtaining medical care. SWORDS TO PLOWSHARES also provides clearinghouse and referral services for veterans in conjunction with governmental, social service, and veterans' assistance agencies, and halfway houses. Several staff members of SWORDS TO PLOWSHARES are existing recipients of or applicants for V.A. disability benefits, and numerous veterans served by SWORDS TO PLOWSHARES have Death and Disability Compensation claims pending before the V.A. or are existing recipients of Death and Disability Compensation, as defined below. SWORDS TO PLOWSHARES was recognized by the V.A. as an accredited service organization under the below-described 38 C.F.R. § 14.628 *et. seq.*, but only after it commenced a civil action to compel its recognition.

4. NARS and SWORDS TO PLOWSHARES bring this action as the representatives of their members and/or constituencies. The nature of the claims alleged herein and of the relief sought does not make the individual participation of each injured member and/or constituent indispensable to proper resolution of the lawsuit. Hereinafter, NARS and SWORDS TO PLOWSHARES will occasionally be referred to collectively as "the Organizational Plaintiffs."

5. DON E. CORDRAY ("CORDRAY"), who resides in Concord, California, is a United States Navy veteran who received the World War II Victory Medal and served aboard the USS Fulton (AS-11) during Operation Crossroads, an atomic bomb testing operation conducted by the UNITED STATES in 1946. He also served in the Korean War and the Vietnam War. After enlisting in the Navy on

March 2, 1945, CORDRAY was assigned to the USS Fulton for duty at the Bikini Atoll during atomic test blasts "Able" and "Baker" of Operation Crossroads in 1946, and was exposed to dangerous amounts of atomic radiation. During atomic blast Able, CORDRAY and eighteen others were positioned on the deck of the USS Fulton as "guinea pigs." CORDRAY was ordered to move in immediately after blast Able to recover scientific test materials from the target ships, and did so. After blast Baker, the USS Fulton, with CORDRAY aboard, towed the S.S. Skate, a target vessel of test Baker, to Pearl Harbor. When the Fulton reached Mare Island in October of 1946 the forward part of the ship was still so "hot" from radiation that it could not be decommissioned.

6. As a result of his exposure to radiation, CORDRAY contracted and now suffers from a very rare form of cancer, oat cell carcinoma. Also as a result of his exposure to radiation, CORDRAY suffers from muscle weakness, severe pain in his lower back, muscle aches and stiffness, and severe headaches.

7. While very ill and receiving regular doses of morphine to kill pain, and without the assistance of legal counsel, he filed V.A. service-connected Disability Compensation claims, as defined below, for these ailments in 1977, 1979 and 1982, all of which were denied by the V.A. on grounds of lack of proof; the most recent denial occurred on January 5, 1983 by the V.A. San Francisco, California Regional Office, Claim No. C 24 942 530. CORDRAY was represented before the V.A. by the Veterans of Foreign Wars. CORDRAY desired to have an attorney represent him before the V.A., but was prevented from retaining an attorney by 38 U.S.C. §§ 3404 and 3405. A true copy of CORDRAY's Accredited Representative's May 31, 1978 Statement concerning CORDRAY's then pending appeal is attached hereto as Exhibit "A", and incorporated by this reference. CORDRAY currently has a 10% V.A. disability rating arising out of an unrelated condition.

8. ALBERT R. MAXWELL ("MAXWELL") is a veteran of the United States Army who served in the Asiatic theater during World War II after being inducted in December 1940. MAXWELL's unit was shipped to Fort Stotsenberg in the Philippines in approximately May 1941, where he served as a tank commander. MAXWELL is a survivor of the battles of the Bataan Peninsula between December 1941 until the fall of Bataan in April 1942. MAXWELL was among the approximately 5,000 survivors of the 22,000 soldiers who were subjected to the Bataan Death March in April 1942. Thereafter, MAXWELL was pressed into forced labor in Cabana Natuan and as a stevedore near Manila, and for a time was confined to Billibid prison in the Philippines. Later MAXWELL was herded along with 1500 other prisoners of war ("POW") into the hold of a "hell ship" destined for Japan. Casualties were legion because of overcrowding, lack of food and water, and the absence of sanitary facilities. Before the hell ship could reach Japan, it was torpedoed and sunk and MAXWELL was among the 52 survivors picked up by a Japanese merchantman. After being turned over to the Japanese again in Formosa, MAXWELL in late 1943 was transported to Mukden, China where he and other POW's were forced into hard labor in a copper mine. From there, he was later conveyed to Nagoya, Japan where he worked as a laborer in a steel foundry. MAXWELL, who is six feet three inches tall and who in the later stages of this last internment weighed 90 pounds, was compelled by his captors to be a member of two clean-up details after atomic bombs were dropped on Hiroshima and Nagasaki on August 6 and August 9, 1945, respectively. His POW camp was also subjected to radioactive fallout from the atomic blasts. On September 9, 1945 MAXWELL's POW camp was finally liberated and in October 1945 MAXWELL returned to the United States aboard the hospital ship "Hope".

9. MAXWELL and his wife Jackie have had five children—Paulette, born July 14, 1948, Michael, born June 13, 1950, Michele, born July 4, 1951, Robyn, born January 9, 1957 and Rebecca, born August 22, 1961. Two of MAXWELL's five children, Paulette and Michael, died in early childhood due to tetralogy of fallot, an extremely rare heart abnormality peculiarly associated with exposure to atomic radiation. Two other children, Michele and Rebecca, died in

early childhood from atelectasis of the lungs, another rare congenital abnormality strongly associated with exposure to atomic radiation. One child alone, Robyn, has survived to adulthood.

10. In December 1947 MAXWELL was given a medical discharge from the Army and awarded a 50% Disability Compensation rating, as defined below, for "residuals of beriberi, malaria, shrapnel injury to right ankle, optic atrophy, conjunctivitis and diminishing eyesight of the left eye." On March 30, 1959, the V.A. Rating Board reduced MAXWELL'S disability rating from fifty percent (50%) to forty percent (40%) due to alleged improvement in his leg scars and vision, Claim No. C9594221. MAXWELL was represented before the Rating Board by the Disabled American Veterans ("DAV").

11. As a result of his above-described exposure to atomic radiation, MAXWELL developed multiple myelomas in approximately 1980. MAXWELL is terminally ill and currently undergoing chemotherapy to treat his cancer. In addition, due to radiation exposure and the severe malnutrition suffered and mistreatment received during his captivity, MAXWELL has suffered from a variety of other diseases and conditions, including malaria, nervous disorders, beriberi, eye diseases, headaches, fatigue, weight loss, insomnia, allergies, degenerative disc disease, chest pains, and calcium spasms, which have from time to time necessitated further hospitalization. MAXWELL has been unable to work since 1979 due to his medical problems, and has exhausted his savings.

12. On December 11, 1981, MAXWELL filed a V.A. claim to contest his service-connected disability rating of forty percent (40%) and seek a total disability rating, and was represented by the DAV. MAXWELL had approached an Ogden, Utah attorney with regard to his possible representation of MAXWELL before the V.A., but the attorney declined to represent him because of the below-described $10.00 fee limitation. No investigation or development of facts was undertaken by the DAV. A true copy of MAXWELL's original claim is attached hereto as Exhibit "B" and incorporated by this reference. Due to unauthorized action by MAXWELL'S DAV representative, MAXWELL'S personal hearing (set for March 17, 1982) was cancelled rather than merely postponed, a fact MAXWELL did not discover until December 1982 when he wrote a letter to the DAV, a true copy of which is attached as Exhibit "C" and incorporated by this reference.

13. On December 2, 1982 MAXWELL filed a further Statement in Support of Claim, a true copy of which is attached as Exhibit "D" and incorporated by this reference. On January 4, 1983, MAXWELL filed a supplemental Statement in Support of Claim, a true copy of which is attached as Exhibit "E" and incorporated by this reference. Thereafter, on approximately February 9, 1982, MAXWELL'S claim for service-connected disability for multiple myelomas, a degenerative joint disease, and a peptic ulcer, was denied by the V.A. Salt Lake City, Utah Regional Office, Claim No. C 09 594221.

14. REASON F. WAREHIME ("WAREHIME") is a thrice-wounded veteran who served in the United States Marine Corp in the Asiatic Theater during World War II and in the United States Army during the Korean conflict from 1950-52. WAREHIME was a member of the United States Marine Corp clean-up detail in Nagasaki, Japan in August 1945 after the atomic bomb blast there. In April 1953, WAREHIME, then stationed at Fort Knox, Kentucky, was ordered to participate in Operation Simon, Upshot Knothole, a 43 Kiloton tower plutonium bomb test shot in Camp Desert Rock, Nevada. WAREHIME was the noncommissioned officer in charge of the advance party of troops assigned to trenches 3000 yards from ground zero of the blast, and, pursuant to orders from his superiors, advanced along with his fellow troops toward ground zero after the atomic bomb was detonated. THE UNITED STATE'S purpose in ordering ground troops into the blast area was to obtain data concerning the behavior of ground troops in nuclear warfare.

15. WAREHIME was honorably discharged from the service in May 1958 and has received V.A. Disability Compensation as defined below, since 1959. The United States lost WAREHIME's service records in approximately 1975

or 1976. Since 1976, WAREHIME has suffered from osteoprosis of the bone, muscle atrophy, sterility, cataracts, and lung cancer as a result of his exposure to radiation in Nagasaki and during Operation Simon. WAREHIME'S left lung was surgically removed in May 1982. WAREHIME is dependent upon crutches and a wheelchair for locomotion, and his left arm is inoperable without a brace. He is blind in the right eye as the result of a series of service-connected injuries.

16. Notwithstanding that several V.A. doctors, including Harry Bouman, M.D., have determined that WAREHIME is unemployable, WAREHIME currently possesses a service-connected disability rating of only 60%, although his disability rating was formerly 100%. He is totally dependent upon V.A. Disability Compensation, as defined below, for his support and that of his wife. WAREHIME's challenge to his 60% disability rating was recently remanded by the BVA to the San Francisco Regional Office for the third time since 1976 for further development of evidence, Claim No. C 13 005 384. WAREHIME personally completed the paperwork concerning his V.A. claim after several attorneys refused to handle his claim because of the below-described $10.00 fee limitation. WAREHIME is a member of DAV and is represented before the BVA by an unknown DAV service officer in Washington, D.C. and was represented by the DAV when his claim was denied by the San Francisco regional V.A. office. The DAV's service officer's role at the regional office level was merely to appear at the hearing with WAREHIME and offer his service and medical records.

17. As reflected in a letter from the V.A. to WAREHIME dated January 22, 1982, and a letter from the V.A. to Robert T. Durbrow, Esq., dated April 2, 1981, true copies of which have been attached hereto as Exhibits "F" and "G," respectively, the V.A. has actively sought to discourage and prevent WAREHIME from obtaining legal representation before the V.A. Exhibit "D," for example, expressly states to WAREHIME's attorney that "your attention is invited to [sic] particular to [38 C.F.R.] section 14.634," the V.A. regulation concerning the below-

described $10.00 fee limitation for handling V.A. claims. Furthermore, as reflected in an undated letter from the V.A., a true copy of which is attached hereto as Exhibit "H" and incorporated by this reference, the V.A. has sought to actively discourage WAREHIME from exercising his right to a personal hearing.

18. DORIS J. WILSON ("WILSON") is the widow of Stanley Wilson, who died on December 12, 1980 from pancreatic cancer. WILSON's husband, Stanley Wilson, served in the United States Navy, mainly in the Pacific Theatre, from June 22, 1943 to June 9, 1947. Several of the Navy ships to which Stanley was assigned after World War II were involved in atomic testing. On one of Stanley Wilson's ships that was contaminated with radiation, several men lost their hair and others became nauseated. The officers and crew were troubled by their inability to decontaminate the ship.

19. In 1979, after Stanley Wilson was diagnosed as having cancer, WILSON contacted a Sacramento, California, attorney to discuss a possible claim for V.A. Disability Compensation. The attorney told her that he could not represent Stanley Wilson before the V.A. because of the $10.00 attorney's fee statute. He further stated that because of the $10.00 limitation he doubted that WILSON could find *any lawyer* who would take a V.A. Disability Compensation case. Because of this conversation, WILSON gave up trying to find a lawyer to prosecute Stanley Wilson's Disability Compensation claim.

20. As a result of his servicetime exposure to radiation, Stanley Wilson died of cancer on December 12, 1980. On December 17, 1981, WILSON filed a Death Compensation claim, as defined below, with the San Francisco Regional V.A. Office. On January 14, 1982, WILSON'S claim was disallowed by the San Francisco office as not service connected. On January 28, 1982, WILSON submitted a Notice of Disagreement on a "Statement in Support of Claim" form, a true copy of which has been attached as Exhibit "I" and incorporated by this reference. In March 1982, she filed a Request for Extension to File Appeal so that she could collect more evidence, not knowing that she had up until a

year from the original decision to file her appeal. WILSON'S service representative, the Veterans of Foreign Wars, did not aid WILSON in searching for records of her husband's exposure to radiation and she found it to be a very difficult and time-consuming process. She still has not been able to obtain many of Stanley Wilson's basic service records or obtain documentation of the particulars of her late husband's service-connected radiation exposure.

21. On May 5, 1982 WILSON received a letter from the V.A. acknowledging her request for a hearing and attempting to persuade her to waive her right to a hearing. A true copy of said letter is attached hereto as Exhibit "J" and incorporated by this reference. On June 23, 1982, WILSON received a letter from the San Francisco Office of the V.A. stating that she must submit any additional evidence to the San Francisco Office by January 22, 1983. WILSON wrote a letter to the San Francisco V.A. Office on January 12, 1983, asking for more time to collect evidence. On January 18, 1983, two days before her time to file additional evidence with the San Francisco Office expired, her Veterans of Foreign Wars service officer advised WILSON to simply allow the time to file additional evidence to expire, suggesting that, if WILSON lost, she could refile with additional evidence. WILSON still desired an extension to allow her to collect additional evidence of her husband's exposure to radiation. However, on February 15, 1983, WILSON'S appeal was denied by the BVA, Claim No. 14 992 808. Hereafter, CORDRAY, MAXWELL, WAREHIME, and WILSON will be occasionally referred to collectively as "the Individual Plaintiffs."

22. The V.A. is an administrative agency of defendant THE UNITED STATES OF AMERICA ("THE UNITED STATES") charged with the responsibility of administering, *inter alia*, Title 38 of the United States Code, which codifies various statutes affecting veterans of the various branches of the armed forces of THE UNITED STATES.

23. Defendant HARRY N. WALTERS is Administrator of the V.A. and is named herein solely in his official capacity. Defendant PAUL D. ISING is Director of the San

Francisco Regional Office of the V.A. and is named herein solely in his official capacity.

III
THE VETERANS ADMINISTRATION STATUTES AND REGULATIONS

24. The V.A. is the third largest federal agency, employs approximately 200,000 people, and has a budget of approximately $22 billion per year. The V.A. operates about 172 medical centers which collectively represent the largest health care delivery system in the world. There are approximately 30 million living veterans and approximately 90 million people are potentially eligible for various veterans' benefits, which include income maintenance, pensions, health care, education, housing, burial benefits and service-connected death and disability compensation. The Administrator of the V.A. has discretion whether to award certain veterans' benefits such as funeral expenses (38 U.S.C. § 902), but not service-connected Death and Disability Compensation as defined below. Approximately 10 million V.A. Benefit claims are filed yearly.

25. The purpose of 38 U.S.C. § 301 *et seq.* is to provide compensation to veterans and the families of veterans who have suffered diseases or disabilities or died in the line of duty. 38 U.S.C. § 310, entitled "Basic Entitlement," provides for disability compensation as follows:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable ... compensation as provided in this subchapter....

Similar provisions are contained in 38 U.S.C. § 321 ("Basic Entitlement" to wartime death compensation), 38 U.S.C. § 331 ("Basic Entitlement" to peacetime disability compensation) and 38 U.S.C. § 341 ("Basic Entitlement" to peacetime death compensation). The rates of wartime and peacetime disability compensation correspond to the percentage

degree of disability found and are specified in 38 U.S.C. §§ 314-315, 334. The rates of wartime and peacetime death compensation are specified in 38 U.S.C. §§ 322, 342.

26. Similarly, 38 U.S.C. § 401 *et. seq.* was intended to provide dependency and indemnity compensation to spouses, children and/or parents of veterans whose deaths were service-connected. 38 U.S.C. § 410(a) provides in relevant part as follows:

> When any veteran dies after December 31, 1956, from a service-connected or compensable disability, the Administrator shall pay dependency and indemnity compensation to such veteran's surviving spouse, children and parents . . .

38 U.S.C. § 411 specifies the rates of dependency and indemnity compensation for a surviving spouse, while 38 U.S.C. §§ 413-414 and 415 specify the rates for surviving children and parents, respectively. When a Death and Disability Compensation claim is allowed, the claimant may be entitled to accrued benefits pursuant to 38 U.S.C. § 3021 and 38 C.F.R. § 3.1000 *et. seq.* ("basic entitlement" to accrued benefits). These statutory entitlements contained in 38 U.S.C. § 301 *et seq.* and § 401 *et. seq.* create property interests protected by the Due Process Clause of the Fifth Amendment. Hereinafter, the above statutory entitlements will be collectively referred to as "Death and Disability Compensation."

27. Qualified claimants for and recipients of Death and Disability Compensation possess a statutory entitlement to such compensation. Death and Disability Compensation is not gratuitous, but is earned by successful completion of the serviceman's enlistment contract and satisfaction of other eligibility requirements. For example, veterans are not eligible for Death and Disability Compensation if they received bad-conduct discharges arising out of a general court martial or, if their injuries were due to their own willful misconduct. (38 U.S.C. § 101(2), 38 C.F.R. §§ 3.12-3.15). By entering the military and becoming potentially eligible for such compensation, a serviceperson, and his or her spouse and offspring, are deprived of their property right to bring an action against THE UNITED

STATES under the Federal Tort Claims Act in any way arising out of the serviceperson's period of national service.

28. 38 U.S.C. §§ 3404-3405, the original predecessor of which was enacted in 1862, govern the circumstances under which agents and attorneys may represent veterans and other claimants for the purpose of preparing, presenting and prosecuting Death and Disability Compensation claims and claims for other veterans benefits (hereinafter collectively referred to as "Benefit Claims"), and Benefit Claim administrative appeals. 38 U.S.C. § 3404(c) provides that an agent's or attorney's fee for an allowed Benefit Claim shall be determined by the Administrator of the V.A. and "shall not exceed $10 with respect to any one claim." 38 U.S.C. § 3505 provides that:

> Whoever (1) directly or indirectly solicits, contracts for, charges or receives, or attempts to solicit, contract for, charge or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

The $10.00 fee limitation is prominently described in various V.A. forms and correspondence sent to claimants, potential claimants, and recipients.

29. The V.A. has promulgated regulations under 38 U.S.C. § 3404 governing representation of claimants for and recipients of Death and Disability Compensation and other veterans' benefits (hereinafter collectively referred to as "Benefit Claimants") in 38 C.F.R. §§ 14.626-14.637, 19.128-19.132. 38 C.F.R. § 14.634(a) provides in pertinent part that

> For the successful prosecution of claims, attorneys and agents may receive the fee permitted by statute [$10]. The fee will be paid to the attorney or agent of record at the time of allowance, by deduction from the benefit allowed, after approval by the Veterans Administration . . .

The regulations make no provision for fees in unsuccessful Benefit Claims or Benefit Claim appeals. Each and every

award of attorneys' fees rests in the sole discretion of the Administrator of the V.A. Plaintiffs are informed and believe, and thereon allege, that extremely few V.A. Benefit Claims result in actual awards of attorneys' fees.

30. V.A. Benefit Claimants possess only a qualified right to representation by counsel of their choice. 38 C.F.R. § 14.629 sets forth the requirements for V.A. recognition of a Benefit Claimant's representative, agent, or attorney and vests the V.A. District Counsel with the authority to resolve any question of their qualifications.

31. As an alternative to self-representation or representation by an attorney or agent, 38 C.F.R. § 14.628 allows a Benefit Claimant to be represented by lay representatives of certain qualified service organizations, such as DAV, the American Legion ("AL"), and Veterans of Foreign Wars ("VFW"). V.A. regulations prohibit simultaneous representation of a Benefit Claimant by both an attorney (or agency) and a service organization. (38 C.F.R. § 14.631(c)).

32. The V.A. has also promulgated regulations granting limited procedural rights to Benefit Claimants. These include the right to a hearing and to present witnesses (38 C.F.R. § 3.103(c)), the right to submit documentary and other evidence (38 C.F.R. § 3.103(b)), and the right to appeal an adverse V.A. decision to the BVA (38 C.F.R. § 3.103(e)). Benefit Claimants have no right to compel the attendance of or to cross-examine government or third-party witnesses or to subpoena documents to obtain material in support of Benefit Claims. There are no provisions for depositions, interrogatories or other formal discovery.

33. Initial applications for Benefit Claims are made to a V.A. regional office, of which there are 57 and at least one in each state. The initial decision respecting a Benefit Claim is made by a rating agency and is called a rating. (38 C.F.R. §§ 3.321-3.323, 3.340-3.341, 3.343-3.344, 3.350-3.384). A schedule for rating disabilities is found in 38 C.F.R. §§ 4.1-4.150. Decisions of the rating agency "as to conclusions based on evidence on file at that time" are "final and binding upon all field offices of the Veterans Administration" (38 C.F.R. § 3.104(a)). Reductions and discontinuances of ratings respecting previously granted Benefit

Claims are governed by the criteria set forth in 38 C.F.R. § 3.500 *et. seq.*

34. When the V.A. acts upon a Benefit Claim, it sends the claimant an initial determination called a "Notice of Decision" pursuant to the authority contained in 38 C.F.R. § 3.100. In cases of denial, the Notice of Decision, a true example of which is attached as Exhibit "K" and is incorporated by this reference, perfunctorily expresses the denial without presenting findings of fact or any other indication of the basis for the denial. Plaintiffs are informed and believe, and thereon allege, that approximately 50% of Death and Disability Compensation Claims are denied in the original instance. The Benefit Claimant is allowed sixty days to submit additional evidence and/or request a hearing. If requested, a hearing is held in a regional office before a three-member board. Plaintiffs are informed and believe, and thereon allege, that the vast majority of V.A. claims initially denied by regional offices are withdrawn or abandoned before exhaustion of the appeal process.

35. To challenge an adverse, final decision by the regional office, the Benefit Claimant must file a "Notice of Disagreement" within one year from the mailing of the original denial expressed in the Notice of Decision. (38 U.S.C. § 4005, 38 C.F.R. §§ 19.113, 19.118(a)). Approximately 70,000 Notices of Disagreement are filed yearly. Upon receipt of the Notice of Disagreement the V.A. may either change its decision and allow the relief requested or proceed, usually within ninety days, to prepare a "Statement of the Case" summarizing the factual record and applicable law, and stating the decision of the V.A. and reason therefore, which constitutes the final decision of the regional office. (38 C.F.R. § 19.115). The Benefit Claimant can challenge the final decision of the regional office by filing a "Substantive Appeal" within 60 days from the date of mailing of the Statement of the Case (38 C.F.R. § 19.118(b)), that must "set out specific allegations of error of fact or law." (38 C.F.R. § 19.116). The Benefit Claimant is presumed to agree with every statement of fact contained in the Statement of the Case to which no exception is taken in the Substantive Appeal. (38 C.F.R. § 19.145(a)).

36. Approximately 40,000 Substantive Appeals are filed yearly, but the vast majority of Benefit Claims do not ever reach the appeal stage. Upon filing of the Substantive Appeal, the claim is transferred to the BVA in Washington, D.C. for decision. The BVA consists of fifteen three-member panels the members of which are appointed by the V.A. Administrator with the approval of the President. Normally, two panel members are lawyers and one is a doctor. A Benefit Claimant can request a BVA hearing before a panel on appeal in which argument and testimony may be presented. (38 C.F.R. § 19.133). However, the panel hearing the appeal is not necessarily the panel that will decide the appeal. No cross-examination is permitted (38 C.F.R. § 13.133(c)), and the BVA "will not require the appearance of any Veteran Administration official or other person." (38 C.F.R. § 19.135(a)). Approximately 1500 BVA hearings are held yearly, and most BVA appeals are resolved without a hearing. The BVA disposes of each issue upon appeal by allowance, denial, remand or dismissal, in whole or in part. (38 C.F.R. § 19.145(b)). The BVA is bound in its decisions by V.A. regulations, instructions by the Administrator of the V.A., and precedent opinions of the V.A. general counsel. (38 U.S.C. § 4004(c)).

37. In approximately ninety-eight percent (98%) of BVA appeals, the Benefit Claimant is not represented by an attorney. The vast majority of BVA hearings last less than one hour, documentary exhibits are seldom offered, and instances in which anyone other than the claimant testifies are infrequent. Approximately 35,000 adverse regional office determinations per year are resolved by the BVA, which typically allows the claims in only approximately thirteen percent (13%) of said appeals. A high percentage of BVA decisions (approximately 16%) involve remands for development of further evidence, and it is quite common for a claim to be remanded multiple times.

38. Decisions of the BVA are final, and judicial review of decisions is expressly prohibited. (38 C.F.R. § 19.104, 38 U.S.C. § 211(a)). Reconsideration of an appellate decision otherwise final may be granted by the BVA based upon allegation of error of fact or law (38 C.F.R. § 19.148(a)), but reconsideration is seldom granted in actual practice.

39. Many V.A. internal rules, policies, guidelines and decisions are not publicly circulated. The "law" applicable to the V.A. Benefit Claims process includes not only Title 38 of the United States Code and Volume 38 of the Code of Federal Regulations, but numerous rules and policy guidelines in internal V.A. documents called "Manuals," "Circulars," "Interim Issues," and "Program Guides."

IV
VETERANS ADMINISTRATION DEATH AND DISABILITY CLAIMS

40. Most V.A. Death and Disability Compensation claims raise complex factual and legal questions respecting proof of service-connected exposure or injury, and medical and other proof respecting causation and degree of disability. Illustrative of extant, complex categories of Death and Disability Compensation claims before the V.A. are those based upon exposure to nuclear radiation during government atomic bomb tests ("Atomic Veteran Claims"), exposure to toxic chemicals such as Agent Orange ("Agent Orange Claims"), drug testing (e.g., LSD), and psychological stress syndrome caused by wartime service ("Stress Syndrome Claims"). These claims, which have only begin to surface in the last decade, present novel issues and often require expert testimony. In these cases, and in all others as well, claimants must obtain documents, studies, reports and other supporting material from a variety of sources to support claims and satisfy the claimant's burden of proof. In many instances, claimants' service records have been lost or destroyed. In addition, the statutes, rules and regulations pertaining to V.A. Benefit Claims are voluminous, complicated, technical and often not publicly circulated. The regulations alone comprise two entire volumes in the Code of Federal Regulations (totaling over 700 pages).

41. The burden of proof and burden of going forward with the evidence respecting V.A. Benefit Claims is on the claimant. 38 C.F.R. § 3.102 provides in relevant part that "the claimant is required to submit evidence sufficient to

justify a belief in a fair and impartial mind that his claim is well grounded. . . ." Plaintiffs are informed and believe, and thereon allege, that a high percentage of V.A. Death and Disability Compensation claims are unsuccessful, and most unsuccessful claims are denied on the basis of an alleged failure of proof. For example, plaintiffs are informed and believe, and thereon allege, that none of the more than 6,000 Agent Orange Claims has been allowed, and less than one percent (1%) of the approximately 2000 Atomic Veterans Claims to date has been allowed.

42. 38 C.F.R. § 3.103 provides in pertinent part as follows:

> (a) *Statement of policy*. . . . It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government.

In actual practice, the V.A. does not assist claimants in developing facts supporting Death and Disability Compensation claims or even attempt a search for information, witnesses or documents that might support such claims.

43. Further, the policy of the V.A. is to treat the record for each Death and Disability Compensation claim as discrete, regardless of whether evidence of record in other, similar claims lends support to the claim being adjudicated. 38 C.F.R. § 3.101 states in relevant part that:

> Conclusions reached in individual cases are frequently influenced by peculiar facts or local statutes and, consequently, will not be followed as precedents. However, where it is apparent beyond question that the situation is identical, such conclusions may be followed as a matter of consistency in the adjudication of claims under the law or regulations applicable.

Similarly, in instances in which the V.A.'s rules or procedures are the subject of a successful court challenge, the V.A.'s policy is to modify or correct its rules or procedures only in the geographical area bounded by the jurisdiction of the particular Court making the determination, and not elsewhere.

44. While an extremely small proportion of Death and Disability Compensation claimants or recipients is able to secure the assistance of attorneys on a *pro bono* basis, the vast majority of such claimants and recipients (approximately ninety-eight percent (98%)), is relegated to self-representation or representation by a service organization. Insufficient *pro bono publico* legal services exist to serve the needs of Death and Disability Compensation claimants, potential claimants, and recipients who desire attorneys to represent them. Even if a claimant does obtain *pro bono* representation, the uncompensated attorney is unable to devote the time, attention and resources to the claim that he or she might if compensated, all to the detriment of the represented claimant.

45. Most members of the service organizations certified by the V.A. to represent Death and Disability Compensation claimants and recipients are not trained or licensed attorneys. The few service organizations who have staff attorneys have insufficient resources to handle anything but an occasional Death and Disability Compensation claim. Neither Death and Disability Compensation claimants and recipients nor the vast majority of the service organization employees recognized as representatives under 38 C.F.R. §§ 14.626 through 14.637 (such as the American Legion and VFW) have the necessary training, personnel, resources, or experience to prepare, present or prosecute Veterans Administration Death and Disability Compensation claims, especially categories of complex claims such as Atomic Veterans Claims, Agent Orange Claims and Stress Syndrome Claims.

46. As a result of 38 U.S.C. § 3404 and the regulations promulgated thereunder, and 38 U.S.C. § 3405, which makes violation of 38 U.S.C. § 3404 a criminal offense, the Individual Plaintiffs and many members of the Organizational Plaintiffs, as well as the vast majority of V.A. Death and Disability Compensation claimants, potential claimants, and recipients, have been unable to obtain lawyers to represent them and pursue their claims. Still others have been discouraged by the fee limitation from even seeking the assistance of counsel. But for the statutory prohibition,

many, if not all, of the claimants who desire attorneys would have obtained competent legal representation. Further, because of the limitations of 38 U.S.C. §§ 3404-3405, SWORDS TO PLOWSHARES staff members lack the resources to properly investigate, prepare and present Death and Disability Compensation claims of its constituents, all to their substantial prejudice.

47. As a further result of 38 U.S.C. §§ 3404-3405, those few Death and Disability Compensation claimants or recipients who are represented by attorneys receive, on the whole, less vigorous representation than they would receive if allowed to compensate their attorneys for the reasonable value of the attorneys' services.

48. Plaintiffs are informed and believe, and thereon allege, that but for the limitations imposed by 38 U.S.C. §§ 3404-3405, Death and Disability Compensation claimants and recipients who either represent themselves or are represented by service organizations would be substantially more successful in either obtaining Death and Disability Compensation or in obtaining an increased percentage of disability compensation. Representation by and the assistance of an attorney in the context of a V.A. Benefit Claim is especially crucial because 38 U.S.C. § 211 provides that a Benefit Claimant or recipient has no right to judicial review of an adverse determination by the V.A. or BVA and because veterans, and spouses and dependents of veterans, are denied by the *Feres* doctrine (arising out of *Feres* v. *United States*, 340 U.S. 135 (1950)) of the right to bring suit under the Federal Tort Claims Act for any claims arising out of the veteran's period of national service.

49. The original purpose of 38 U.S.C. §§ 3404-3405, the predecessor of which was first enacted in 1862, was to prevent Benefit Claimants and recipients from becoming victims of overreaching and unscrupulous attorneys. At that time Veterans' Compensation was solely in the form of a pension and all that needed to be proved was the veteran's service record. None of the complex problems of proof that exist today in categories of claims such as Atomic Veteran Claims, Agent Orange Claims and Stress Syndrome Claims existed. The historical rationale for the $10.00 fee limitation is not applicable today, and in operative fact, the present effect of the statutes is to prevent Death and Disability Compensation claimants and recipients from obtaining legal representation and assistance concerning Death and Disability Compensation claims and appeals, thus arbitrarily and without regard to their merit reducing the number of such claims filed and the number of successful claims.

50. Neither the V.A. nor THE UNITED STATES has a legitimate interest in precluding Death and Disability Compensation claimants or recipients from entering into fee contracts with attorneys in an amount in excess of $10.00. Veterans and Death and Disability Compensation claimants and recipients, unlike minors or incompetents, are as capable as the general populace of protecting themselves against sharp practices. Moreover, far less restrictive alternatives than the $10.00 fee limitation exist to guard against overreaching by attorneys.

51. The Individual Plaintiffs herein, and members of the Organizational Plaintiffs who are Death and Disability Compensation claimants or recipients, have strong First Amendment interests in freedom to associate with attorneys and petition the V.A. for redress of their grievances, and a Fifth Amendment liberty interest in freedom to contract for legal representation as they see fit. Moreover, many potential and existing Death and Disability Compensation claimants and recipients, including the Individual Plaintiffs and many members of the Organizational Plaintiffs, are, or in the case of applicants, will be, totally or primarily dependent upon such compensation for their support and necessities of life.

52. The limited procedural rights accorded to Death and Disability Compensation claimants and recipients by V.A. regulations described in paragraph 32 are materially impaired or rendered meaningless without the benefit of representation by trained legal counsel, and, as a result, claimants are denied the right to a full and fair hearing. Further, the V.A. encourages unrepresented claimants to waive important procedural rights such as the right to a hearing.

FIRST CLAIM FOR RELIEF
(Declaratory Relief:
Procedural Due Process)

53. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52.

54. A present controversy exists between plaintiffs and defendants in that plaintiffs contend and defendants deny that 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the regulations promulgated thereunder, both on their face and as applied to plaintiffs, unconstitutionally infringe upon plaintiffs' property and liberty rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.

55. 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, both on their face and as applied to plaintiffs, are unconstitutional because they deprive plaintiffs of their property and their liberty without affording the due process required by the Due Process Clause of the Fifth Amendment to the United States Constitution.

56. The Individual Plaintiffs and Organizational Plaintiffs herein have been forced to retain counsel to redress the constitutional violations complained of herein, thereby incurring substantial attorneys' fees and costs. In addition to the other relief prayed for herein, plaintiffs are entitled to reasonable attorneys' fees and costs incurred herein pursuant to 28 U.S.C. § 2412 and any other applicable law.

SECOND CLAIM FOR RELIEF
(Declaratory Relief:
Substantive Due Process)

57. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52 and 56.

58. A present controversy exists between plaintiffs and defendants in that plaintiffs contend and defendants deny that 38 U.S.C. §§ 3404-3405, and the regulations promulgated thereunder, unconstitutionally infringe upon plaintiffs' substantive due process rights protected by the Due Process Clause of the Fifth Amendment of the United States Constitution.

59. 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, have no rational purpose and bear no rational relationship to the purposes behind the Death and Disability Compensation statutes, all in violation of plaintiffs' substantive due process rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.

THIRD CLAIM FOR RELIEF
(Declaratory Relief:
Right to Petition V.A. for
Redress of Grievances)

60. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52, 56, and 59.

61. A present controversy exists between plaintiffs and defendants in that plaintiffs contend and defendants deny that 38 U.S.C. §§ 3404-3405, and the regulations promulgated thereunder, violate plaintiffs' rights to petition the government for redress of grievances and to effective access to the V.A. as an adjudicative agency protected by the First and Fifth Amendments to the United States Constitution.

62. 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, materially, unreasonably, and unjustifiably impair plaintiffs' ability to present their grievances before the V.A., the only tribunal that can afford them relief, and as a result plaintiffs are deprived of meaningful access to the V.A. in violation of the First and Fifth Amendments to the United States Constitution.

FOURTH CLAIM FOR RELIEF
(Injunctive Relief)

63. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of Paragraphs 1 through 52, 56, 59, 61 and 62.

64. The Individual Plaintiffs herein, as well as the members of the Organizational Plaintiffs, will be required to engage in a circuity of actions if injunctive relief is not granted forbidding the V.A. from enforcing or seeking to enforce the provisions of 38 U.S.C. §§ 3404-3405, and the V.A. regulations promulgated thereunder. Further, absent injunctive relief, they will suffer damages in amounts which will be difficult, if not impossible, to quantify, and will suffer great and irreparable injury.

65. Plaintiffs are entitled to a preliminary and permanent injunction forbidding defendants from enforcing or seeking to enforce the provisions of 38 U.S.C. §§ 3404-3405 and the V.A. regulations promulgated thereunder.

66. To remedy the effects of past and continuing constitutional violations, plaintiffs are entitled to a permanent injunction prohibiting defendants from denying any motion to reconsider any Death and Disability Compensation claim prosecuted heretofore without the services of an attorney and from refusing to award to claimants or recipients whose revived Death and Disability Compensation claims are successful upon reconsideration accrued benefits under 38 U.S.C. § 3021 back to the date of original filing of each such claim.

WHEREFORE, Plaintiffs pray for judgment against defendants, and each of them, as follows:

FIRST CLAIM FOR RELIEF

1. For a declaration that 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, both on their face and as applied to plaintiffs, deprive V.A. Death and Disability Compensation claimants and recipients of their property and/or liberty without due process of law in violation of the Fifth Amendment to the United States Constitution;

2. For reasonable attorneys' fees and costs of suit incurred herein;

3. For such other and further relief as the Court might deem just and proper.

SECOND CLAIM FOR RELIEF

4. For a declaration that 38 U.S.C. §§ 3404-3405, both on their fact and as applied to plaintiffs, and the V.A. regulations promulgated thereunder offend plaintiffs' substantive due process rights protected by the Due Process Clause of the Fifth Amendment to the United States Constitution;

5. For reasonable attorneys' fees and costs of suit incurred herein;

6. For such other and further relief as the Court might deem just and proper.

THIRD CLAIM FOR RELIEF

7. For a declaration that 38 U.S.C. §§ 3404-3405, both on their face and as applied to plaintiffs, and the V.A. regulations promulgated thereunder, deprive plaintiffs of meaningful access to the V.A. and of their right to petition the government for redress of grievances in violation of the First and Fifth Amendments to the United States Constitution;

8. For reasonable attorneys' fees and costs of suit incurred herein;

9. For such other and further relief as the Court might deem just and proper.

FOURTH CLAIM FOR RELIEF

10. For injunctive relief as follows:

(a) for a preliminary and permanent injunction prohibiting defendants from enforcing or seeking to enforce the provisions of 38 U.S.C. §§ 3404-3405 and the V.A. regulations promulgated thereunder;

(b) for a permanent injunction (i) prohibiting defendants from denying any motion to reconsider a claim for Death or Disability Compensation prosecuted heretofore without the services of an attorney and from refusing to award to claim-

ants or recipients whose revived Death and Disability Compensation claims are successful upon reconsideration accrued benefits under 38 U.S.C. § 3021 back to the date of the original filing of each such claim; and (ii) prohibiting the V.A. from failing to advise existing and future V.A. claimants or recipients of the nature of the relief accorded herein;

11. For reasonable attorneys' fees and costs of suit incurred herein;

12. For such other and further relief as the Court might deem just and proper.

Dated: April 13, 1983

MORRISON & FOERSTER
KATHLEEN V. FISHER
GORDON P. ERSPAMER
MICHAEL F. RAM

By /s/GORDON P. ERSPAMER

Attorneys for Plaintiffs

JURY TRIAL DEMAND

Plaintiffs hereby demand a trial by jury herein of all issues triable thereby.

Dated: April 13, 1983

MORRISON & FOERSTER
KATHLEEN V. FISHER
GORDON P. ERSPAMER
MICHAEL F. RAM

By /s/GORDON P. ERSPAMER

Attorneys for Plaintiffs

EXHIBITS TO COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

A. Cordray's Accredited Representative's Statement, May 18, 1978

B. Maxwell's Original Claim for Disability Compensation

C. Letter, dated December 5, 1982, from Albert Maxwell to the Veterans Adjudication Board

D. Maxwell's Statement in Support of Claim, December 2, 1982

E. Maxwell's Supplemental Statement in Support of Claim, January 4, 1983

F. Letter, dated January 22, 1982, from the Board of Veterans Appeals to Reason Warehime

G. Letter, dated April 2, 1981, from T.A. Verrill to Robert T. Dubrow, Jr., Esq.

H. Letter undated from T.A. Verrill to Reason Warehime

I. Wilson's Statement in Support of Claim, January 28, 1982

J. Letter, dated May 5, 1982, from T.A. Verrill to Dorris Wilson

K. Notice of Decision

EDITOR'S NOTE

PAGES 44 thru 215 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Form Approved
OMB No. [illegible]

VETERANS ADMINISTRATION

STATEMENT OF ACCREDITED REPRESENTATIVE IN APPEALED CASE

TO	SERVICE ORGANIZATION (Name and correspondence symbol)	DATE 5-16-78
	LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN: CORCORAN, DON, E.	FILE NO. 24G42550

All evidence in connection with this appeal has been considered. Please complete and return the statement below on or before the date indicated. If we do not receive either the statement or a request for extension by that date, it will be necessary for us to certify the appeal to the Board of Veterans Appeals on the present record.

REPLY REQUESTED BY (Date)	ORGANIZATIONAL ELEMENT MAKING REQUEST (Name and correspondence symbol)

TO BE COMPLETED BY ACCREDITED REPRESENTATIVE

I HEREBY CERTIFY that a statement of the case was furnished; that appellate review is desired on the evidence now of record; and that the issues for consideration of the Board of Veterans Appeals are clearly defined.

☐ I REST THE APPEAL ON THE ANSWER TO THE STATEMENT OF THE CASE AND THE HEARING ON APPEAL (If conducted).

☒ I WISH TO MAKE THE FOLLOWING ARGUMENT TO SUPPLEMENT THE ANSWER TO THE STATEMENT OF THE CASE AND OTHER ARGUMENT OF RECORD:

the veteran appeals for service connection for sciatic nerve damage which he contends was caused by injections after contamination by atomic fallout.

He believes his arthritis is of many years standing and had its inception during service.

The third part of the appeal is for an increased evaluation of his duodenal ulcer.

COPY
Original Document
On File With The
Veterans Administration
(VAROSF)

(ATTACH ADDITIONAL SHEETS IF NECESSARY)

SIGNATURE AND TITLE OF REPRESENTATIVE	DATE
[signature]	5/31/78

VA FORM JUL 1965 1-646 EXISTING STOCKS OF VA FORM 1-646, JAN 1962, WILL BE USED.

EXHIBIT A

HEARINGS 11-19-87 11:00 a.m. HEARING ROOM A

Beri Soccone
55 Geil
Salinas, Ca 93901 408-422-9491

NAME: ALBERT R. MAXWELL
DATE OF ENLISTMENT: DECEMBEB, 1940
DATES AS P.O.W. 4/8/'42 to 9/12/'45
DATE OF DISCHARGE: 12/18/'47
SOCIAL SECURITY # 520-10-1098
SERIAL # 20949094
V.A."C"# 9-594-221

P.O.W FLAG

A. FLAG FOR P.O.W.

UGTGRANS ADM. OFFICE

FOR ADVISORY BOARD COMM. ON FORMER P.O.W's

495-8064
8065

REFERENCE FOOTNOTES:

* Notation of illness.

++++ Memory loss, blackouts.

Insomnia, Nightmares.

##" Anxiety, stress, mental/emotional trauma.

** Illness and treatment documented by Medical records at V.A. Hospitals and by V.A. Doctors.

+* Illness and treatment by private physician and civilian Hospital so designated (location, etc.).

@ Congenital anomalies of Maxwell Children.

EXHIBIT B

NAME -- ALBERT R. MAXWELL
DATE OF BIRTH- 6/12/1920
DATE OF ENLISTMENT -DEC. 1940
DATES AS P.O.W. -4/8/'42 to 9/1
DATE OF DISCHARGE- 12/18/'47
SOC. SEC. # 520-10-1098
V.A."C"# 20949094
PAGE 1 OF 21 PAGES.

APPROXIMATE DATE	APPROXIMATE WEIGHT	EVENT	COMMENTS
Dec '940	185	National Guard 115 Calvary Unit Casper, Wyo.	Member of the National Guard 115 Calvary Unit, stationed in Casper, Wyoming.
Dec 1940	185	U.S. Army 194 Tank Btn. Camp Lewis, Washington.	Our Nat. Guard unit was inducted into the U.S. Army. I am in perfect physical condition. No waivers nor comments of any type. Transferred to the 194 Tank Btn. at Camp Lewis, Was:
Feb 1941	185	" " " " (Corporal)	I made Corporal!
June 1941	175	Fort Statsenberg, Phillipines.	Fort Statsenberg is adjacent to Clark Field. Beautiful here, haven't gotten used to heat. Lost : pds. but feel great!
July'1941	180	SERGEANT'.	Made Sergeant! Really love the service, comrads!
Dec 7, 1942	"	PEARL HARBOR BOMBED	The Japanese have attacked us!
Dec 8 1941	"	WAR DECLARED	Our Tank Battalion is deployed around the perime of Clark Field.
Dec 9'1941		Clark Field Bombed.	MacArthur would not order planes into air, they all completely destroyed -on the ground!
" "		Lingayen Gulf / Rosales / Olangapo /	Our Battalion was in the field, in battle, on the front lines throughout the entire campaign. Fighting from Lingayen Gulf, Rosales, Olongapo, Bataan & Mariveles covering the retreat of all of th Philippine forces.
" "	168	/ Mariveles /	* I've had two attacks of Malaria. One in the morn & again in the afternoon of the same day. I also ha dysentary--seems to be a constant thing with all of Feel weak & shaky all the time.
Jan'42	?	/ / / / / Bataan	Early in the Campaign, ran out of food and medica supplies. Because of this 80% of men had dysentary, 75% Malaria.
Feb'42	155	/ / / / /

NAME-Albert R. Maxwell
V.A. "C" #20949094
SOC. SEC. # 520-10-1098

APPROXIMATE	APPROXIMATE	EVENT		COMMENTS
Feb 22'42	155	Bataan		Pres. Roseveit's promised us food, medicine, re-enforcements! Help is coming, we can hold!
Feb 26'42	"	HOMMA GETS!		Tokyo Rose announced that Japanese re-enforcements have arrived, along with planes, two divisions & artillery & food.
Mar 2'42	"	Hungry! (all the time).		We've been cut to 5/8 rations! Our Forces are dwindling rapidly (about 50 men dyir daily in their foxholes from Malaria & starvation).
Mar 10'42	?	MacArthur Leaves		We're all so weak & dizzy. Dysentary so bad some c men can't make it out of foxholes, so lie in their owr excrement. We all look like Scarecrows!
Mar 15 "	"	Starvation Diet!!		Wainwright went to Corregidor for food--MacArthur left orders we were to receive none.!??? Save for Corregidc
Mar 18 "	"		*	I have yellow jaundice, my eyeballs are as yellow as my skin?! Hands & feet are really swollen.
Mar 20	"	"Lt. Gen" Wainwright		Wainwright's appointment is official. God, how we love that man! He was right up their with us on the front lines fighting side by side with us.
21	"	Wainwright in command- Corregidor		His first action there--sent us 'some' food.
Mar 2 6	"	America's newest Alamo!	*	Blinding headaches--what I wouldn't give for an aspiri
Mar 27	"	WE ARE EXPENDABLE! (SO- says) (Tokyo Rose)!		President decides it's more important to save England from Germany than to save the Philippines. Food, medical supplies & re-enforcenents are re-routec to Australia. Mac Arthur misled War Department about the number of c troops here--they believe us to be 40,000, we are 90,000 plus 11,000 on Corregidor!!!???
April 1	"	United Press Correspondant Frank Hewlett writes our Epitaph!		"We're the Battling Bastards of Bataan, No Mama, No Papa, No Uncle Sam- No Aunts, No Uncles, No Cousins, No Nieces No pills, no planes, no artillery pieces. And 'nobody' gives a damn!" F. Hewlett
Apr 6	"	Last day of battle.		Exhausted, so sick, looks as though we've had it. Forced back to the ocean. Superior forces in number equipment in front of us, we will have to surrender!!
April 8 '42		"BATAAN FALLS!"		Can't BELIEVE this happening to an Army of the United States-but it has, oh, it has. We're all NUMB -no one is speaking at all.

NAME--Albert R. Maxwell
V.A. "C"# 20949094
SOC. SEC. # 520-10-1098

May 21'42	"	Sick again!	*	My feet are so swollen can hardly stand on them, hands too. Fingers look like sausages, the skin so tight looks like it will split. All of my joints pair it's 'wet' beriberi. What next?
				Forced to work anyway--those unable to are cut to 1/2 rations and starve to death. We are repairing airfield.
May '42	"	Treatment of prisoners.		Discovered early my size (6'2+) was serious handicap. It produced an almost psychogenic effect on my captors. (Perhaps because of their own small stature) it really disturbed them to have to 'look up' to the enemy. Whatever their problem was, I certainly came in for more physical attention and heavier work assignments.
July '42	"	Nose broken.	*	Continually slapped & beaten so much across the he and face, my nose has been fractured & broken so often has spread clear across my face. Got a Schnozz like
			*	'Durantes.' Bad nightmares--wake up--and it still is!
Sept '42	"	Saber Happy		The Camp Commandant dislikes us. Every morning at inspection he walks past us ticking across our forehea with his saber, causing the blood to stream down in ou eyes. Then he comes back to me & either stands on a box, or has me kneel so he can slap me across the face. I'll carry the scars of that saber the rest of my life. We're all beginning to look like something out o a Frankenstein movie!
Aug '42	119			Humiliation is their number 1 priority!
		Treatment of prisoners.		They are truly diabolical. They play psychological on any weakness that manifests itself. Special observation on those who craved cigarettes.
Dec '42	"			Guards would take a couple of puffs on a cigarette, then flip the rest just barely over the fence, then walk away, and the guys would make a dive for them, & be shot for "attempted escape."
Mar 1943	"			When they give those prisoners a choice between food & cigarettes they invariably choose the latter--and starve to death! Our food ration is so low anyway.
				For any infraction of the 'rules' there was a specia treatment. They disciplined them by placing them in a 4ft. square box made of bamboo slats placed in the sun The occupant could neither lie down or stand up, merel remain in a squatting position. They were to remain there for 30 days, with little food or water. No one
		Operation	*	The camp Dr. performed a hemorrhoidectomy with a mes kit knife (they've taken away all his instruments). No anesthetic! I'll never laugh at another 'pile' joke! I wonder if I'll ever laugh at anything anymore!
	43	? Port Area Manilla Bay	*	The largest of us were transferred here to work on on the docks as steveadores. It is heavy work. Back is really giving me fits--'specially when we stand on feet all those hours without a break.

May'43	"	Ration Procurement	I was assigned to draw rations from the Philippinos The Spanish people there were neutral & exempt from surveillance--so they smuggled what items they could in to us. Anything helps!
June '43	"	Apprehended	I was intercepted receiving some quinine, crude sugar cane candy & a note with some news on it!
July'43	118	BILIBID PRISON	Been sent to Bilibid prison, placed in a cell with a cement floor & receive 1/2 bowl rice, small amount of water a day.
" "	"	DEATH SENTENCE	Sentenced to 45 days heavy confinement prior to being shot!! This is to serve as an example & warning to res
'42			Used to live from day to day, now it's hour to hour minute to minute.
		Missionaries	Discovered Mormon missionaries, civilians, are in cell next to me. They haven't done anything, but are to be shot the same day as me!
" "			We've decided we won't have blindfolds. They have such wonderful attitudes--feel like they've completed the Lord's work. Wish I had accomplished all that they have. Been running a fever--have malaria again.
Aug 5'43		Sentence COMMUTED!	Taken out to be executed, the missionaries were shot separately, in two volleys of bullets. I waited for the third round to come. It never came. They stood aiming at me for an interminable time, then at a [illegible] and lowered their rifles & all began laughing & laughing, & said "I wasn't to be shot after all."
Aug 18 (?)	89!!	Cerebral Malaria	I've been told that I was unconcious for over 10 days, and have had cerebral malaria! The worst attack of malaria I've ever had. I weigh 89(!)pds.
			Can't BELIEVE I'm still ALIVE!! (If you can call th living)!? I look like a cadaverous, bald, Abe Lincoln
		?	I'm experiencing a memory loss, find my memory bank is a complete blank to my 15 th year! Having trouble retaining anything I'm told. Awful headaches.
			Having terrible nightmares, can't sleep, but then I've got lots of company, nobody else can either. Funny thing--can't remember what I do dream about!?
ug 30' 43	94	"HELL SHIP"	With 1100 hundred othe. prisoners placed in the hol of a ship. So jammed in that confined space, sat between each others knees. Only sanitary facility was a large wooden tub in midd!e for communal use. So hot, stench so offensive, almost impossible to breathe. Given no food nor water, some of the men went mad- tried to drink their own urine & began attacking each other. My Buddy & I managed to sit back-to-back to fight off those who went beserk! We're now reduced to animal behavior. Had no conception of time, day or night, no idea how long it was before we finally reache Japan.

Sept'43	90	Nagoya, Japan (Steel Foundries)	*	We are now in Nagoya, Japan at Concentration Cam #: Having splitting headaches! We are ferried across the bay each morning to work at the steel foundry.
Dec'44	95	Steel Foundry		We were given 3/4 cup of rice and a cup of fish broth daily--more than we had received here-to-fore. The reason being that the work was so heavy. If we were unable to work, for any reason whatsoeve the rations were cut in half. Everyone was in such a weakened condition that if rations were cut, death frc starvation resulted in a matter of days. We lost scor of men during these first few months.
" "	"	WORK		Work consisted of shoveling ore into smelting pits (Large pit with three large carbons which were used to form an electric arc to melt the ore). The bright electric arcs between the carbons created brilliant blinding flashes. The heat was extreme and we were given no protective eye gear, indeed our only apparel were grass mats covering shoulder to knee. Worked 12 to 14 hour shifts.
"	"		*	Strain on back muscles was excruciating. Back reall giving me fits!
Feb'45	90	Temporary Blindness	*	Constant exposure deflected to my eyes from the arc of carbons caused me to lose my sight for two weeks! My rations were only cut for five (!) days, lost 5 pds.
		Allied Bombings.		Around this time American bombers began nightly bombardments over the camp area. They were trying to destroy the steel foundries, and Mitsubishi steel mill about 50 miles away at Hiroshima. Throughout the bombings, amid chaos & confusion, we stole soy beans from the barges--a wonderful addition to our diet.
April'45		Injured	*	During one of these raids that I was hit in my righ ankle by a piece of shrapnel. Gangrene soon set in & and the Japanese wanted to amputate. We had a wonderful camp Dr. who intervened on my behalf stating that he could save the limb (given the chance). He knew that in my weakened condition that I would never survive an amputation. Each morning the Dr. would scrape the putrification off the ankle-bone with a knife, then bandage it. (The was no medication available to us). The smell was nauseaus, took an hour each day to put weight on my fo I had to work in spite of this--& possibly it was the most beneficial treatment I could've had. The intense heat on my infected foot went right to the bon & against all odds, it began to heal.
June 45	90	Temporary Blindness Again.	*	However beneficial this proved for my ankle, the reflection of those brilliant flashes from the arcs of carbons caused another temporary blindness, but permanent damage to my eyes.

NAME--Albert R. Maxwell
SOC. SEC. # 520-10-1098
V.A."C" # 20949094

Aug 6'45	89	HIROSHIMA BOMBED	This morning on our way to work there was a tremendous explosion (naval bombardment we thought). The sky lit up like nothing we had ever seen. Massiv clouds. We thought it might be our Navy but our Guar said that they had a new secret weapon they were testing. Sometime later the sky darkened and there was a storm coming from the northwest with a dirty rain accompanying it.
Aug 9 '45	"	NAGASAKI BOMBED	Today there was another of those Japanese experime The noise wasn't pronounced, but we saw the same type clouds, much later there was threatening weather. The Japanese are jubilant!! Evidently the experiments were a success.
Aug 15'45		Civilian Guards!	There is something going on--our military guards have been replaced by civilians--except for the detail guards. About 24 of us are being sent out on a work detail
Aug 17'45		Work Detail (Clean up)	We've been taken somewhere here in the Honshu province (about 65 miles or so) to work cleaning up debris. The devastation is terrible. (We think their weapon must've back-fired). This can't have been any sort of bombing raid--nor could it have been a natura disaster! (Or at least nothing I've ever read or heard about could qualify as an explanation for all o this).
			* I've got some kind of rash all over my arms & legs
Aug 24'45			We were brought back to camp & have not been detai our anymore. We have all civilian personnel now.
Aug 31'45		U.S. FORCES??	Some of the guys overheard the Japanese talking- & think that they've heard rumors that U.S. Forces ha landed & are occupying Japan. WOULD THAT IT WERE SO! It's difficult to live without hope, but worse sti to get those hopes up & discover it's just another Japnese deception.
Sept. 2'45		?	Nothing else has happened, no bombings, planes or anything.
Sept 7'45		OUR FIGHTER PLANES!	Planes, our fighter planes, flew low over our camp today. About 6 hours later they flew back again and dropped packages to our compound. There was food, clothing and a some medical supplies. Everyone went wild, everything is total confusion speculation.
Sept 9'45		LAST CAMP LIBERATED!	Our camp was liberated today by a Company of U.S. Marines. The planes that spotted us were Marine pl.c off of a carrier. Nothing was ever a more wonderful sight than those Marines. We must've looked pretty gruesome to THEM-- 'cause they cried when they hugged us.

18'45	89	Manilla (Staging Area) (Camp)		We are here to be de-loused, fumigated & bathed!!! Those who had retrogressed mentally were separated from us. Thought if the psychiatrists had examined u we'd never get home. They didn't give us psychiatric evaluations like they did when we entered the service Given brief physicals. Shortest examination I've had in the service. They were more interested in how much weight- & teeth we'd lost, than in how we actually felt physically!?
"		FOOD!! (Baby food)		All we ever talked of or dreamed about in concentration camp was food.--Our favorite kinds--dishes ou Mothers used to make---what we'd get for first meal i we were ever released. Everybody wanted STEAK & FRIE We got BABY FOOD, everything strained, as much liquic as possible. Tasted wonderful anyway! (Especially wh you considered the alternative (cats, dogs, lizards, rats--or worst of all NOTHING)!
Oct'45	96	HOSPITAL SHIP "HOPE"	*	Gained 7 pds.. feeling much better, except for thi rash on upper arms, hands & legs--puffs up, & I itch all over. This journey home is unbelievable--that's the word for it. Can't believe this is reality not just a dre
t'45	98	Called HOME!		We were allowed to call home. It was a shock on both my part & my folks. I thought I was listed MIA but I'd been declared officially dead. My sister (who raised me) fainted when she heard my voice! When she revived, all she did was cry!
" "	"	" "	*	Rash has gone but my hands & feet still keep swell ing. especially my [illegible] hand. Still have 'sweats' & are all- still having nightmares (suppose 'cause when we 'do' sleep we think we're still in concentration camp & 'this' is just a dream)! BUT WE ARE GOING HO
Oct'45		GOLDEN GATE BRIDGE		Most 'beautiful sight' I've ever seen, that fantas span of the Golden Gate Bridge & standing on the deck as we passed under it. Then SAN FRANCISCO & HOME!
" "	"	San Francisco The PRESS!		Reporters were waiting for our ship to dock--but they've been denied access to us, told 'not' to photo-graph us. 'We' were told not to discuss our capitivi nor treatment except with our families. "WHO" wants to "TALK" ABOUT IT??? "WE" LIVED IT!" (They managed to get shots & some films anyhow, m (folks SAW them--We never did--didn't care to. We afterwards learned that they didn't want to inc public opinion or reaction because "it was going to be difficult to set up some type of government for the people of Japan." "And after all the war WAS over, we should just 'FORGET IT!" IF ONLY WE CAN!

Nov 45	100	The Presidio- S.F. Calif.	Thot we'd be- here for a long 'weighing in' type of of procedure, but just given another brief, cursory examination. We were only here a couple of days.
Nov'45	115	Camp Carson Colorado (Peterson Field)	Allowed to go into Colorado Srings today.Everything so beautiful-'normal' & 'unchanged.' 'I've' changed s that I expect everyone & everthing to be altered in some fashion also. Such a contrast to the last 4 years! Thank God all the horror of death, starvation atrocities, man's inhumanity to man never touched these shores.
			I've lived with 'death' as a 'daily companion' and 'life' on a 'holding' pattern for so long I'm finding i ## difficult to cope. Thought just being back was an instant 'cure-all' (panacea) for all my problems. Not so!
Dec'45	120	Casper, Wyo.	Went home on leave to Casper (my home town). My folks have really gone through hell worrying about me. Everytime my Sister looks at me, she cries. Says I've changed so, how terrible I look, and feeds me six time a day! They start reminiscing & are 'really' upset ## when I can't recall events or remember the people they invite over to 'see' me.
	134	"	Getting such mixed reactions from everyone. Treate with such compassion, it borders on pity-that's the last thing I want. (However well meaning). And they all want me to TALK ABOUT THE CONCENTRATION CAMP. Jeez I can't & they all feel rebuffed, my folks are hurt to
"	"	Evanston, Wyo.	Visiting here, I took the car out for a drive, got the 'shakes,' blacked out & hit a tree. Luckily no one * injured. Had another attack of malaria. Scared my fo to death! They didn't say anything about the car! Took me to the Dr., he checked me over and said I a * 'impotent & sterile!' We'd been told to expect that.
		SALT LAKE CITY "Incident"	* Told folks had to do Xmas shopping. 'Had' to get awa ## So nervous I'm driving myself & everyone else crazy. Staying at Hotel Utah, there is a 'laughing' Santa Claus in the window of ZCMI that goes 24 hours! Driving me nuts! I put on 'civilian clothes', went to the Beau Brummel Restaurant. It was really crowded. I was seated on the mezzanine reading a menu when the waitress asked i I would 'share' the table. I said yes, & when I looke up, seated across from me was a Japanese person. In that split second, he 'became' every guard who'd ever humiliated, degraded, mistreated or tortured me in the last 4 years. I began to tremble all over, & asked if he wouldn't please leave. He said 'no, he wouldn't', then added 'who in the Hell do you think you are, you 4F'er! (a draft term for those who didn't qualify for service). We both stood up. I must've gone 'berserk', I hit him so hard that I knocked him over the railing (break it) and onto the downstairs eating area!

Dec'45 " Salt Lake City, Utah

I was taken to the Police station where I told t nothing. Finally one of the Officers noticed my 'do tag' & called Ft. Douglas.

I was taken there & placed under observation for four days (which kept me there over Xmas)!

When my Army records, P.O.W. status established & verified, the Psychiatrist felt that given my circumstances my behavior was understandable, & predictable I was released. There were no charges pressed agains

I had waited for 5 years to spend Xmas with my fc They'd planned a big celebration & I'd spent it in a psychiatric ward! I was too ashamed to tell them wh really happened, so told them my leave was canceled.

This taught me two 'object' lessons- first, that the civilian life I'd so deparately wanted was NOT for M I simply couldn't adjust to "it", nor 'CIVILIANS!" Secon

\# That I must learn to contain myself physically and emotionally as well as I'd done in prison camp. Just because I'm home doesn't give me license to vent my anger & frustration on those about me (& I seem to b filled with so much of both)! Worse, it surfaces any time I'm in close proximity to 'any' Oriental person (I know this to be unreasonable--& I've since learne that most Japanese Americans here at home were inter themselves)! But my reason seems to desert me when need it most.

'eb'45 160 Ft. Douglas, Utah

Re-enlisted. Been put on 'limited' duty, Recruiting Given my choice of location in the 9th Corps Area, I chose Ogden, Utah. Why, I don't know, probably becau

\# I didn't KNOW ANYONE there at all.

Mar'45 175 Ogden, UTah

Gained 15 pds. in a month!

Love this duty & the Army. They seem to be impresse with my Recruiting performance.

Find I'm still not at 'ease' out socially yet.

* Still have trouble sleeping--when I do, wake myself screaming.

* On my feet for any length of time, experience= se cramps or charlie horses at night, in legs & feet.

Apr'45 " " "

My co-workers are all seasoned military career me & great to work with. Captain has quite a 'pithy' vocabulary, but comical. The other Sergeant here is of the finest men I've served with yet. He was awar Congressional Medal of Honor. He doesn't mention 'w & I don't ask. His only comment to me about my serv "I hear you were a Japanese P.O.W." I said 'yes', he shook my hand, & that was that. We have a good rapp I think I've found my niche!

NAME= Albert R. Maxwell
SOC. SEC.#520-1-1098
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" " COMMENDATION

I received a commendation today for the highest number of enlistments during the last three months f entire western district.

" *

So tired all the time, can't seem to ever get enough rest. Guess it's 'cause I don't sleep well.

" "THE GIRL"

Have had absolutely no desire to 'socialize' at a 'till now. I've always had a vivid mental 'picture' 'my' dream girl. And I've acutally met the 'real thi right down to the last detail! It's unbelievable!

For the first time I'm actually looking forward, instead of backwards. Her name is Jackie.

Took me forever to meet Jackie, now I have, I've

/ almost 'blown' it by my 'irrational' behavior. (Her wo

First date, went to movie & we were seated by som Japanese people. I wanted to leave & made the mista of telling her 'why.' (without explaning what prompts

"Incidents??! She thinks I'm a 'bigot!' (One of her best friends Japanese)! Very cool towards me for a week!

Picked her up for a date. As we were leaving, the neighborhood 'pet' dog was killed in the street. Sh dashed out, picked it up, got blood all over her dre I got mad, told her that it was a 'stupid' thing to 'cause she'd ruined her dress. She cried and told m that I was 'insensitive' & 'unfeeling' & she never wanted to see me again! (I haven't looked upon a do or a cat as a 'pet' for so long, only as something t eat)! How in the world can I tell her that, with th way she feels about animals??

Our relationship's gone from bad to worse.

I also committed a big 'faux pas' without knowing When I first met her father, he said 'it's nice to s you again??!" I'd been in her home, met her Father

"Memory Blackout" tried to recruit her brother for the service (didn't 'cause he already had an appointment to West Point),

* didn't remember any of it, other than he 'looked' a little familiar! He also said that I'd looked at a picture of Jackie & told him that she looked just li the girl I wanted to marry!! No wonder I had such a clear picture of her! I tried to 'cover' up that I' forgotten the whole thing, but he knew--& I think he worried. HE'S worried??"I'M"FRANTIC! I CAN'T TALK about it yet, & I know she deserves to know the trut

Her darling little Mother seems to 'sense' that there is an explanation. If it weren't for her, I'm sure Jackie wouldn't ever see me again. Her Mom mus really done some talking, (to give me an another char

* I 'forgot' two dates with Jackie! She thinks I im thoughtless & uncaring, that I don't love her. S doesn't want to see me again!

I went out to her house to try & explain 'what' 'causes me to 'do' these things. She wasn't there.

June 46	155	TALKED!	I was so depressed, and I started talking with Jackie's father, & I broke down completely. I must've talked for three hours, and cried for the first time in almost 4 years. Felt like I was drained. He showe interest & compassion, not pity. Said he & her mother would explain everything to Jackie. (I couldn't go through that again--it brings back everything too * vividly). I had nightmares all that night again. I've lost 20 pds. over the last two months.
			Jackie bought me a special 'pocket' diary to carry * with me to use 'in lieu' of my imperfect memory. To 'jot down' a few 'dates' & events like a possible (? WEDDING date. She didn't want to be left at the alter because I'd forgotten what day & where it was to be.
			It has helped considerably. Don't know whey I didr think of it before. It would've saved a lot of heart-aches & misunderstanding.
Oct'17'46	174	WEDDING DAY!	We're married in Jackie's home town, by her Bishop. She's Mormon, like the two Missionaries I met in Bilib
		Logan, Utah.	I'm being baptized into this church, & someday we will be re-married in the Temple.
Dec'46	160	Ogden, Utah *	My weight seems to go up & down like a yo-yo.
Feb'47	170	" " *	I was examined today. We both really want children Told that I was still sterile, and might always be so! We're both crushed!
May'47	175	SAN FRANCISCO, CALIFORNIA	As an Ex-POW I was given a two-week all expense pai anywhere we wanted to go. We chose San Francisco & the Fairmont Hotel, because it's our favorite place in the whole world.
		*	After ten days I had a terrible attack of Malaria, lost 25 pds in next 7 days. They flew me to Madigan General Hospital. I'm stationed on Whidby Island, Was
Aug'47	"	Whidby Island *	Been missing work a lot, feeling really miserable.
		Wash. * (79 Amphibious) (Track Co). *	Having absolutely 'awful' headaches! Eye is giving me fits!
			They've decided to operate on my eyes, although the Doctors say that the left eye has really atrophied.
Sept'47	"	Madigan General Hospital	Eye operation. Had 'egg shell' cups over my eyes f days. Jane Russell came to visit our Hospital & I couldn't even SEE her! (She sat on my bed & talked to me though).
Dec'47	"	" " MEDICAL DISCHARGE (50% Disability)	Doctors have decided that I'm not 'physically fit' for Army duty. They have Discharged me with a 50% disability compensation for "Residuals of Beriberi, Malaria, Shrapnel injury to right ankle, Optic Atrophy & Conjunctivitis & diminishing eyesight of the left eye."
			I don't have any idea of what I'm going to do now. I had wanted the Army as a career.

NAME Albert R. Maxwell
SOC.SEC.# 520-10-1098
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Dec'47	175	Ogden, Utah	Wonderful news--I am no longer sterile--& we are expecting a baby! Don't think either of us was ever happy.
		New Job.	I have a job, Selling of course. What ever I sel I deliver. On my feet a lot & it's heavy work but I'm never been happier. (I deliver cases of White Rock & Pabst Blue Ribbon Beer). I have my own delivery truck.
Jan'47	"	COLLEGE	I'm going to Weber State at night, majoring in Pub Relations!'
Mar 48	165		* My lower back is really bothering me. I've notice my stomache & abdominal area is really 'tender,' Jackie insisted I visit their family Dr. He exami me & told me I shouldn't be doing so much lifting. H also said that I had all the makings of a real 'rice- * belly' because of my extreme malnutrition. She told him about my nightmares and he suggested some medicat to help me sleep. He also thought I appeared to be * very nervous. Attributed to 'not enough sleep.'
July 14'48	178	BABY GIRL!	We have the most beautiful baby girl, lots of blac hair,'enormous' big blue eyes & dimples. 6 pds. 7oz. Naming her "Paulette" after Jackie' sweet Mom. Jacki had real difficulties delivering.
		Congenital Anomalies!	Our baby has a rare heart abnormality called "Tetralogy of Fallot." (A combination of four concur- rent symptoms or defects)! She also had a misplaced rectum which they have corrected surgically. They have told us she probably won't live much longer than year! (Can't conceive of a life without her).
Aug'48	185	" "	They have put us through the 'wringer' with all of their questions. They repeatedly asked Jackie if she had undergone x-rays, or been exposed to radiation.
			All strongly suggest we consider having another baby right away. This type of thing would never happen ag
Sept 24'48	"		* It's been so hot--I've had a really bad attack of * Malaria, almost 'out of my skull with headaches. Jackie's truly angry with me because I won't check into the V.A. Hospital. They'd only put me under observation, give me complete bed rest, & give me Quinine or-Atabrine. They've given me both to take when needed, so I'm staying at home, & 'sweating' it ou
Oct 14'48	"		Our baby is really a 'Daddy's girl.' She dimples ea time I even look at her & gets so excited when I walk towards her she hiccups. When I pick her up she chuckl out loud, & only 3 months old. Has a tooth at this age! She has my whole heart in those tiny hands.
Dec'48	"		Paulette has filled our whole life with joy, she i such a 'charmer', with those smiles & dimples & a very happy, sunny disposition. A real 'giggler!' Dainty.
Jan'49	"		(Can't conceive life with out her).
Feb 15'49	190		Nervous, eating compulsively, gained more weight. Checked in V.A. Said my eye not correctible. Dr. Beac

Sept 3'49	"	LOST OUR BABY	Desolate! Our baby was ill one day & gone the ne: Try to think of it as a blessing for her sake, so sh: won't have to suffer. But all I can think of She is GONE! This pain surpasses anything I've ever endured. Am so worried about Jackie.
Sept 10'49	"	Sick	* Nightmares, headaches this past whole week. Have slept since Paulette died. Sick.
			* Another attack of Malaria.
Dec'49	174		* I've lost 20 pds.
Feb'50	180	Another Baby	We are going to have another baby. This time the will take it Ceasarean section for her sake & baby a
May'50	185		Have a new job, selling again. Automobiles, no lifting, am doing well enough to buy new home. Am fixing up nursery. Like a new lease on life.
Jure 13'50	"	BABY BOY!	Husky little boy, three(?) blonde hairs on his hea weighs 8 pds. 10 oz. Named him Michael Birch Maxwell Born on his Grandfather's birthday.
" "	" 200		Weighed today at the hospital-gained 15 pds!
" 14'50	"	CONGENITAL ANOMALIES "AGAIN"	Against impossible odds, our baby has "tetralogy of fallot." Doctors say they've never known another such occurrence! We're stunned! Doctors have come f all over to examine both of us, Michael & Paulette's medical records, trying to determine the possible cause. Questioned all older members of both families, (I'm youngest of seven children who've produced some 52 offspring, all of whom are normal, also 12 grand-children, likewise)! No history of any abnormalities! Jackie's family has genealogy records & family histories going back two-hundred years, with listings of ailments, deaths, etc, NO ANOMALIES!
Jun'50	"	Some hope.	Michael has an otherwise healthy body. They tell us not to give up hope. We'll try to prolong his life, hoping for a successful operation to be developed.
"	"	Sick Went to V.A.	** I've had another attack of Malaria, I finally went to V.A. Hospital. All they did was examine me, & sen me to Dr.C.S. Evans, he said my left eye seemd very * dialated with a diminished vibratory sense, able to s: movement only.
Aug'50	"	MICHAEL'S OPERATION	They've been monitoring Mikie carefully & discover: he has 'premature 'showings' of Hydrocephalus. They Are going to operate on him, remove a kidney & insert a catheter that will draw off the excess fluid from t: brain. It's really terrible risky, because of his he:
Sept'50	"	"	Operation is a complete success. They are showing films of it at the Boston Medical Convention!

	"	Second Job.	Mikie will be hospitalized for 3 months time! I've gotten a night job to try to supplement our inc
June 29'51	225	V.A. Hospital **	My back & lower spine are really giving me pain. Dr. W.H. Wright says it's arthritis of lumbar spine!
July4'51	"	Another Baby Girl! (not planned)!	A 'perfect' baby girl, perfect heart, the most gorgeous baby I've ever seen! The whole hospital sta think so too. Doctors have come in from all over to examine her, because of the condition of the last two They are all so thrilled for us. She is such a 'doll (looks like her Mother). Has little dark curls, big dark eyes, & dimples--all over her body--she only weighed 5 pds. 14 oz- 18 inches long, but she's reall a 'chubb.' We are all on cloud '9' For some reason Jackie is convinced that all is not 'right,' even tho' the Drs. have assured us that she is 'perfect.' Named her Mich
July7'51	"	GONE!	Our 'perfect' baby girl died today! Doctors were all stunned. She developed breathing problems & quit literally 'smothered' to death. Diagnosis "Atelectasi of the lungs." Another congenital abnormality! The Drs. did say that at least it proved we could hav a normal baby---(that sometimes these cases were pro uced by prematurity. She was two weeks early).
(ly'51	"	Sick-again. *	I've been so bitter, so full of hurt & pain. If it weren't for Jackie & Mikie I really wouldn't want live! Life is so precious & hard to come by, that I never thought I'd feel this way. But I do. Can't ea nor sleep! The nightmares & headaches are back again
July'51	"	Malaria *	Have had another attack of Malaria.
Aug'51	"	Medical conference.	We've spent two whole days, going over all records available to us, the Doctors are baffled! They've said since there is no previous medical history on either side of abnormalities, that it was 'just one o things.!!' In reviewing my service medical records they were truly 'upset' that I hadn't mentioned my having been in Japan when the Atomic bombs were dropped there. Wanted to know "if I had been in the area" (I had)," I'd spent any time there" (I had) had worked in the ar (I'd been detailed there to clean up 'debris'). "Had I injested any food or water while there" (I had). "Ha i had any 'ill effects' manifest themselves during th time?" I'd had an awful 'rash' of some sort, that cam & went. I hadn't had it for some time.
" "	"	NO MORE CHILDREN!	In view of all the above, they strongly advised us to have no more children. We'd (or I'd) already deci that because Jackie almost lost her life each time wi Ceasareans. Her doctor was terribly concerned about

Dec 18'51	"	V.A. Hospital	**	My left eye is really twitching,quivering all the t Diagnosis--more rest to alleviate eye strain,"prescrib dark glasses. Dr.Beadle(?).
June'53	220	Malaria	*	First attack I've had in 2 yrs. time! Lost 22 pds. Having a lot of stomach discomfort, lots of gas. Jack thinks I'm getting an ulcer. That's all I need. I feel like a 'hypochondriac' I have so many aches & pa
June'55	200	Las Vegas, Nevada.	+*	Went to Las Vegas to be witness at my cousin's wedding. The temperature was 110. Got a severe sun-burn. Began having chills & fever, had another attac of Malaria. Jackie had to bring me home.(Dr. Payne)
July'55	"	Logan, Ut, Mikies operation.		They have done a 'catheterization' on Mikie, prior to operating on him in Sept. He's doing so well now. Walking, talking, just learned to swim 2 weeks ago, that we really fluctuated concerning the heart operati But have decided to go ahead with it.
Aug 5'55	"	"MIKIE'S GONE!"		Mikie was ill yesterday, is gone today! (Just like Paulette)! We are both still in a state of shock!! He had beaten all the odds in cases like his, for longevity, prgress, etc. We'd tried never to get our hopes 'up' for his future--but we've fought so long & hard to give him his chance (especially Jackie). I'm really concerned for her. Before she was the 'strong' one. Not so this time.
Aug 8'55	"	Malaria	*	I've had another attack of Malaria. Headaches fier
Nov 11'55	220	V.A. Hospital	**	Pains in chest area, fever. X-rays showed 'mucous" Diagnosis--- (Dr. Varo, Dr.Dovey)."Some type of viral infection, cause undetermined."
Jan'56	"			Jackie & I've had the only serious quarrel of our married life. She wants another BABY.! 'I' don't!! Her Dr. doesn't want us to even consider it. Said he'd already told her that he wouldn't take care of her if she did become pregnant! That maybe she could go thru it again, but 'he' couldn't!
April'56	"	HAVING A BABY!		Jackie has convinced both me & the Drs. to go along with her wishes. If 'she' has that much faith I guess all of us should do likewise. First time 'she' has 'fel- that the baby 'would be' alright! She will try to carry the baby over the 9 months to give it a better chance. The Dr. worries about a possible rupture of the uterine wall, but is watching her 'daily' the last 2 months.
Jan 9'57	"	ROBYN KELLY MAXWELL		Drs. all love my wife, they've called our new little girl "Beauty's Beauty!" She was 2 days shy of 10 montt Weighed a whopping 10 pds. Looks like a 2 month old baby. Run every conceivable test on her. Everything i NORMAL! She's darling, blue-blue eyes, red gold hair. HEALTHY---and all ours. My cup runneth over! I'll have to listen to 'I told you so' the rest of my life. And 'I' didn't want another baby! Thank God for her!

NAME- Albert R. Maxwell
SOC.SEC. # 520-10-1098
V.A."C"# 20949094
PAGE 17 OF 21 PAGES.

Jan'58	230	SELF EMPLOYED!		I have gone into Real Estate. Glad I'm able to so. Can work at my own pace. This way when I have miss work because of illness I can make it up when feel well.
Feb'58	"	TURNED DOWN FOR MORTGAGE & LIFE INS.	+++	Bought another new house, was turned down today Mortgage & Life Insurance! They conducted their ow examinations. Am worried about my family's future security! (Varicose veins Bad. Had vein Ligati on Left. Leg
Sept 26'58 / " " / Sept 30'58	"	V.A. Hospital / " /"		Having those 'same type' chest pains I had a coup of years ago. X-rays & thorough examination by Dr. Craddock & Dr. Romney. Ran tests for three days. Diagnosis--"undetermined," not Cardiac though.
Feb'59	"	Sick	*	Another attack of Malaria. My hands & feet are swollen, & are numb periodically again.
Mar 3'59	"	V.A. Hospital	**	Edema, numbness of extremities, recurrent 'right Lumbar' pain. Thickening & redness of eyelid margir suggest "chronic blepharitis." Dr. J.H. Latimer.
Aug 17'61	"	V.A. Hospital	**	Completely Fatigued. Missed 3 weeks work. Extre pain in chest wall. X-rayed. "Not cardiac." Dr. Ron
Aug 22'61	"	ANOTHER BABY!, Rebecca Maxwell		Robyn has been so beautifully healthy, decided to try again. Another beautiful dark haired baby girl.
(		GONE!		Jackie was unable to carry the baby the ten months t they'd planned upon. Premature 2 weeks. Weighed 5' Lived the same amount of time as Michele. Died with
		CONGENITAL ANOMALY!	@	same ailment! Atelectasis of the lungs!'
Aug 26'61	"	V.A. Hospital	**	Heartsick, completely fatigued. Diarrhea, burnin sensation when voiding. Some chest pain still. Che heart again. It's Ok. C.V.A. tenderness. Dr. Romne
June'62	"	Chest Pains.	+*	Agonizing chest pains, thought I was having heart attack. Dr. Thomson feels they are "severe muscle spasms" caused by complete lack of calcium, due to the extreme malnutrition I'd suffered.
Dec'62	"	Headaches & Insomnia	*	Not sleeping, having night 'sweats' & headaches ac Nervous, & gastric distress.
Mar'63		Sick	*	Chills & fever & 'sweats.'
June'64	"	" "	*	" " " & swelling of hands & feet.
Sep'64	"	Chest pains.	+*	Dr. Thomson still feels I'm experiencing calcium spasms. Says they'll probably increase in intensity I get older!'??
April'65	"	Insomnia	*	Seem to have 'chronic' insomnia. Am awfully nervo Stomach aches. Headaches always.
(				
Mar 29'66	"	V.A. Hospital	**	Eyes really bothering me. Dr. Sontag treated me.
Sept 27'66	"	"" " "	**	Dental check up.

NAME - Albert R. Maxwell
SOC.SEC.#520-10-1098
V.A."C"# 20949094
PAGE 18 OF 21 PAGES.

Oct 14'66	"	V.A. Hospital	**	Haven't been able to work for 3 weeks. So tired and worn out. Dr. Taye says 'come back' in 2 weeks.
" 28'66	"	" " "	**	Another check up, says try to 'get more rest!.' Ga me lots of vitamins. Aches & pains, sores on back c legs will not heal. White count of Blood abnor
Nov'8'66	"	" " "	**	Same symptoms, no change. "Asymptomatic, if change order biopsy." Dr. Taye
June 22'67	"	SWEATS again	*	Sweats, fevers and chills again. Run a fever for days. "Sweats' are worse at nights.
Nov'67	"	Eyes	**	Eyes are bothering me again. Examination by Dr. Sontaag.
Nov 29'67	"	V.A. Hospital	**	Extremely bad headaches, running fever again. Dr.
Feb 4'68	"	" " "	**	Same chest pains again. Fatigued. Diagnosis- Uppe right quadrant pains Chest x-rays. "Undetermined-- Dr. G. Norberts.
Nov 19'68	235	" " "	**	Headaches'!!!! Dr. Taye gave me some more medica
June 5'69	"	" "	**	Extreme fatigue. Prescribed Multivitamins. Dr. Robert
Sept 2'69	"	" " "	**	Eyes are continually 'gummy' & 'pus' filled in mornings. Dr. Sontaag
Dec 27'69	"	Chest Pains / DEE-MCKAY HOSPITAL Ogden, Ut.	+*	Chills, fever, upper right quadrant pains.----- (Emergency entrance-to Dee-McKay Hospital). leukocyto of 16,000. Violent reaction to IVP Dye! Dr. Thomson "Etiology Unknown." / /
July 22'70	"	V.A. Hospital /	**	Same symptoms as above emergency hospitallization Severe pain, upper right quadrant, running fever, ch
Aug 6'70	"	/ / / / / / / /		" Visible 'bulge' over upper right quadrant, indisc 'cyst-like' unpalpable mass, 13 cm." -- Dr. Denton 1- Right upper quadrant pain, "etiology unknown." 2- Malrotation of kidney, Nephrotomorams ruled out horseshoe abnormality. 'Possibly Mesentary." 3-Hypaque allergy, manifest by local pain, Uticaria & Nausea." -- Dr. Blackwood /
Oct 5'70	"	V.A. Hospital / /	**	Same symptoms as previous admittance 1-Upper right quadrant pain-Etiology undetermined. 2-Choledocliothiasis suspected.
"20'70	"	/ / /		Pains & mass disappeared after 4 days time. Barium enema & x-rays showed diverticulosis of co
Report on 8/6/70--- Nov 2'70		/ ----- / /	**	3- Most likely explanation of patient's pain was a spontaneously reducing volvulus of the small bowel. (Dr. Stowell of Radiology Dept).
: 19'70	"	/	**	" " " " " "
Dec 18'70		Eye Clinic Ogden, Utah	+*	Eyes are 'glued shut' each morning with extraneou matter. Dr. Winn Richards.

May 19'71	"	Unable to Work		Severe fatigue & headaches. Unable to concentrat or work.
Nov 11'71	"	Allergies		Allergies are giving me fits, rashes & hayfever.
Mar 17'72	"	Sick again		Chest pains, headaches. Prescribed Valium at ons of pains.
Dec 4'72	"	V.A. Hospital		Headaches!!! Sooo- nervous, insomnia. Dr. Taylor Tension, can't turn it off anymore.
Mar'73	"	Malaria again.	+*	Had an attack of Malaria. Atebrine prescribed by Dr. Thomson.
Mar7'73	"	V.A. Hospital	**	Fever & chills.
" 9'"	"	/		Remains fevarish.
" 12'73	"	/		"Etiology undetermined." Dr. Taye
May 16'73	"	V. A. Hospital	**	Eyes are scratchy, bloodshot, headaches. Changec lenses. Dr. Sontaag
Aug 14'73	"	V.A. Hospital	**	Pains in chest. Fever (low-grade)
" 27 "	"	/		Still running fever.
" 31 "	"	/		"Etiology undetermined." Dr.Taylor
		/		
Sept 27'"		/	**	Another attack, same symptoms. Liver scan for abcess or Hemochromatosis. "Etiology undetermined." Dr. Hallrde.
Feb 6'74	"	V.A. Hospital	**	Pain in right shoulder some muscle spasms when tes for pressure. No chills nor fever. Zylocaine reliev somewhat. "Probably tension Myositiis." Dr. Taylor
Mar 2'74	"	Dee-McKay Hosp.	+*	Back pains still bothering me badly. Dr. Carl Mat ran x-rays, believes I've an injured or slipped disc. Dr. Car Mattson Orthopedic Surgeon.
Mar 9'74	"	V.A. Hospital	**	Back is giving me fits. Am scheduled for the Neurc clinic on 4/9/74. Dr. Taylor
		/		Am having some numbness along lateral sides.
" 19'74	"	/		
" 21' "	"	/		This Dr. thinks it's all in my head, that I'll just ha to learn to deal with it. (asked for early medical his gave it to him, then felt 'I felt' it to be more perti than it was)! Asked if I'd seen a Psychiatrist! (I'd be glad to do so, anything to be rid of this pain!) "Dr. Oliverrio"
Apr 9'74	"	V.A. Hospital	**	Heat packs & muscle relaxamts prescribed.
May 15'74	"	Back to work		Heat packs & complete bed rest really helped. Feel much better.
Oct 12'74	"	NERVES!		Really nervous. Headaches bad. Insomnia, nightmar
Mar 5'75	"	FEELING GOOD!		Worked 6 months straight without having to take any off. WONDERFUL!!

Oct 2'75	"	V.A. Hospital /	**	Headaches back. Aggravated!! Dr. Taylor
Jan 9'76	"	/	**	" " " " " changed Rx to Darvon. Dr. Taylor
May 10'76	"	/	**	Allergies, aggravated hay fever. Changed Rx so I wouldn't be sleepy while driving. Dr. Taylor
Aug 5'76	"	/	**	'Extremely' nervous. No sleep for weeks. Dr. Taylor
Jan 19'77	"	/	**	Chest pains again'!. Lower left chest. Can't bre without pain. "X-rays showed 'disc atelectasis' on field bone." Dr. Hosely
July'77	"	FEELING GOOD'		Worked another six month stretch, no time off. Th are looking better!
Nov 3'77	"	V.A. Hospital	**	Have had intermittant pains in my heel for couple months. X-rayed, found calcaneal "Plantar fasciliti Dr. Jackson
Mar'78	"	Stomach pains.	*	Much pain, gastric discomfort after meals.
June'78	"	" "		" " " " " " and at nig
Oct 20'78	"	V.A. Hospital	**	"Peptic ulcer with a diagnosed duodenal ulcer- (diverticulum) by upper GI. Has Hematemesis." Recorded by Dr. Bennett
Mar 4'79	"	SWEATS!	*	Sweats, fevers & chills. Insomnia.
Aug 12'79	"	Back pains.	*	Severe back pains (lower back). They think it's a in my 'head.' Could be--I have enough headaches!
May 13' 80	"	V.A. Hospital	**	Hip, back & shoulder pains. Can't sleep, too muct discomfort. "Treating me for arthritis." Dr. Romney (At least HE believes the pain is real)!
Sept 29'80	"	V.A. Hospital	**	Still the same symptoms'!. Dr. Romney
Oct 28'80	"	V.A. Hospital	**	Fever & chills and night 'sweats.' Dr. Romney
Jan 14'81	"	St. Benedict's Hospital Ogden, Ut.		Emergency entrance. Bad fall on buttocks & back!! (anywhere but on my BACK) Lost conciousness. Had a 5 day period of Renal failure-the blow so severe. Hospitalized 2 weeks. (Dr. Stratford--Dr. Packard)-- X-rays showed "degenerative joint disease of Shoulder back."
April 6'81	"	V.A. Hospital	**	Extreme pain radiating through buttocks & groin. X-rays showed "fracture of L1 lumbrosacral spine," also showed "2 densities on left consistent with renal stone: or calcified nodes." Dr. Jensen
Oct'81 / / /	"	V.A. Hospital / / /		Pain now intense througout hip, back, buttocks. Hip x-ray show 'hot' spot on pelvis. Dr. Bennett & Dr. Jensen.
Nov 81 / / / /	"	/ / / /		"Violent, extreme Urticaria." Bone Marrow biopsy & aspirate Bone scan Bone survey Diagnosis-- "Multiple Myeloma.!" Dr. Fredrick Gibbs &
Dec 12'81	"	/		---------- Dr. Black

Jan 9'82	"	V.A. Hospital (University of Ut).	**	Hematology clinic.
Jan 25'82	"	V.A. Hospital	**	Chest Wall Pains, Acute distress. Upper respirat track infection. Urticarial vasculitis angioedema. Chest x-rays. X-rays comparison with 11/9/81 show an Enlarged Heart! Dr. Futrell
Feb 3'82 / Feb 4'82	" "	V.A. Hospital / /	* **	Sleeping problems while in hospital. Dr. Talone
Mar 16'82	"	(University-Ut).	**	Patient has "degenerative disc disease & bibasilar actelectasis." Dr. Hackman
Mar 25'82 / " 26'82	" "	V. A. Hospital / /	** **	Hematology. Abdominal pains again. Possible renal stone. Dr. Jensen - Hackman Degenerative change of the Thoracic spine. Dr. Hackman
April 7'82	"	PALO ALTO V.A. HOSPITAL	**	Residing here with our daughter while searching f our own residence. I became ill with chills, fever cough. I reported to V.A. Hospital in Palo Alto. Chest showed congestion. Antibiotics. Dr. Smith.
Aug 13'82 / / / / (Visiting my Folks).	"	Ft.Collins, Colorado (Poudre Valley) (Hospital) / V.A. Hospital Denver, Colo.	** **	Emergency entrance to Poudre Valley Hospital for suspected kidney stones. On orders of Dr. transferr to V.A. Hospital in Denver, Colorado. Dr. Abbey Kidney stone diagnosis confirmed by nuclear scan. Dr.? Chief Urologist.
			**	Continuing Hematoloty treatment therapy.

To whom it may concern:

I, Senior Master Sgt. Albert L. Leach (Ret). do hereby attest and affirm that as survivors of the 'Bataan death march', Sgt. Albert R. Maxwell and myself were among other prisoners of war who were transported on one of the 'infamous' 'hell-ships' to the island of Japan.

We were incarcerated in the concentration Camp # 6 at Nagoya, Japan in the Honshu Province, in September of 1943. We remained there for a period of two years time.

During that time we witnessed the Atomic bombings of Hiroshima on August 6, 1945, and Nagasaki, Japn on August 9, 1945 with the subsequent "black-rains" and'fallouts' thereafter (although we thought that they were Naval bombardments and extremely unfavorable weather conditions following the action). We were later told that the'weather' we were experiencing at this time was indeed "fallouts" from the Atomic bombing.

We were one of the last camps to be located and liberated. Our liberation occurred during the week of September 2, to September 9, 1945.

All of the above deposition I do solemnly swear, and testify thereto.

M/SGT Albert L Leach

Senior Master Sgt. Albert L. Leach
Serial-# 6274624
Soc. Sec. # 520-09-7211

Present Address- 69 Cambridge Heights
Novato, California
74749

Witnessed Sarah Young

SARAH YOUNG
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
MARIN COUNTY
My Commission Expires Feb. 12, 1985

RADIATION
RESEARCH
INSTITUTE

November 18, 1982

To Whom It May Concern:

I first saw Mr. Albert R. Maxwell on October 22, 1982. Mr. Maxwell is a former prisoner-of-war who was diagnosed with multiple myeloma in October 1981. It is my opinion that the chance that Mr. Maxwell's multiple myeloma was caused by his radiation exposure in the service is beyond a "reasonable doubt."

Mr. Maxwell is a 62-year-old veteran who was a prisoner-of-war at Nagoya Camp Six in Japan from 1941 to September 1945. At the time of the atomic bombing of Hiroshima on August 6, 1945, he was in Nagoya, about 80 miles from Hiroshima, and recalls "black rain" over the city following the bombing. A few days after the bombing, he was sent into Hiroshima to help clean up debris off the roads. He used his bare hands as tools and wore no protective clothing. He was sent into the bombed areas 2-3 times for a day at a time over a period of 2-3 weeks. He drank the water there and ate food cooked in the open in large iron pots. About 7-10 days after he had first begun to work in the clean-up, he developed nausea and itching, welts, and blisters to his skin.

Mr. Maxwell was diagnosed with multiple myeloma when lytic bone lesions were found on a bone scan in October 1981. Soon after, a bone marrow examination confirmed the diagnosis. He has had two series of radiation treatments and is undergoing chemotherapy with Cytoxan and prednisone.

As you know, the Federal Government includes multiple myeloma in its second category of radiation-induced cancers -- those cancers whose association with ionizing radiation appear "meaningful" (Federal Register, December 31, 1981). The increased incidence of myeloma found in the Hanford mortality study (Mancuso, Health Physics, 33(5), 1977) suggests that the myeloma risk at low levels of radiation is greater than previously estimated.

It is my understanding from a Defense Nuclear Agency report (August 12, 1980) that there have been five (5) confirmed cases of multiple myeloma among the 1,000 Marines who were involved in ground-zero clean-up operations at Nagasaki in late September 1945. The Defense Nuclear Agency has entered into a contract with the National Academy of Sciences to conduct a mortality/morbidity study on the individuals participating in the occupation of Hiroshima and Nagasaki.

2288 Fulton Street Suite 306 Berkeley, California 94704 415-848-8056

Due to the fact that Mr. Maxwell is a former prisoner-of-war who was exposed to an unknown but most probably a very considerable amount of radiation in the clean-up of the atomic bomb debris, and due to the fact that he has multiple myeloma, a cancer that has a definite association with ionizing radiation, it is beyond a "reasonable doubt" that his myeloma is due to his radiation exposure.

Sincerely,

Susan D. Lambert, M.D., M.P.H.

Susan D. Lambert, M.D., M.P.H..

sdl:sas

State of California } SS.
County of Alameda }

On this the 22nd day of November 19 82, before me,

Joan C. Klatt,

the undersigned Notary Public, personally appeared

Susan D. Lambert.

☐ personally known to me
XX proved to me on the basis of satisfactory evidence
to be the person(s) whose name(s) is subscribed to the within instrument, and acknowledged that she executed it.
WITNESS my hand and official seal.

OFFICIAL SEAL
JOAN C. KLATT
NOTARY PUBLIC - CALIFORNIA
ALAMEDA COUNTY
My Comm. Expires Nov. 4, 1985

Joan C. Klatt
Notary's Signature

GENERAL ACKNOWLEDGMENT FORM 7110052

NATIONAL NOTARY ASSOCIATION • 23012 Ventura Blvd • Woodland Hills, CA

American Ex-Prisoners of War

11-10-82

TO WHON IT MAY CONCERN:

re: Albert R. Maxwell
SSN 520-10-1098

In my interview with mr. Maxwell in september of 1982, it was discovered he suffers from many of the stressors common to former prisoners of war of the far east.
The fact that he has been unable to remain on one job for any length of tim has been examined. It was discovered that there are numerous experiences that have caused flashbacks to life threatening events he experienced while a P.O.W. These have been found to be conditions that he believes can only be eliminated by moving on, one job to another or to a new area where he thinks these situations can be avoided. Most of the incidences that are a source of irratation to Mr. Maxwell are trivial and would be unnoticed by the average person.
Goimg to bed with these things on his mind prevents him from getting a good nights sleep, or wakes several times during the night making him tired and irratable the next day. This has caused him to isolate himself socially, and more than normal in the business invironment much to his financial disadvantage. When he does sleep, he is subjected to frequent nightmares that have led to an overabundance of stress, as they always relate to his prison camp experience.
The prognosis for Mr. Maxwell is poor, as many studys, including the one recently made by the V.A. has shown these problems to become more pronounce in the latter years.
A list of the studys refered to above are available on request.

Sincerely,

Lew Hastings

Lew Hastings
Psych.services

LEW HASTINGS, Ph. D.
National Service Advisor
8191 Owens Street • Buena Park, California 90621 • 714 523-0770

To whom it may concern:

My first encounter with Albert R. Maxwell was on the occasion of his visit to recruit my son into the Army. My son had recently received an appointment to West Point so we merely visited about the service and the opportunities that we both felt it offered as a career, etc.

I was impressed with his appearance, pleasant disposition and his obvious dedication to and enthusiasm for the Army and the service.

My second meeting with Al (as I would now call him) occurred when he appeared at my home as a suitor for my daughter Jacqueline. He didn't recall our prior meeting nor having been in my home previous to this. (This absence of memory, or memory blank and his behavior pattern and reactions to social situations was to be a controversial issue in the courtship of my daughter).

After much misunderstanding, and confusion on my daughter's part, she had decided to terminate their dating, stating that she just couldn't understand him. When Al came over that evening I am sure the he was aware of her decision to do so. He sat talking to me while she was getting ready to go out, relating a few of his Army experiences and suddenly he completely 'broke down' and cried. All the hell he'd endured for the past four years poured out. He talked non-stop for hours. (I later learned that I was the first and only person he'd ever spoken to concerning these experiences, and incidentally he'd not do so again for some years).

I explained some of these things to Jacqueline and in doing so, clarified some of his 'un-explainable' behavior, rectifying the situation to the extent that it resolved the existing problems.

They were married on October 17, 1946 in Logan, Utah.

I was aware that Al did suffer from headaches and backaches from the outset of our relationship, but was unaware that he was also suffering from recurrent malaria until our daughter so informed us.

It was brought sharply to my attention in May of 1947, while we were vacationing in California, Al was stricken with a particularly virulent attack of malaria losing conciousness and losing a great deal of weight during the attack. He was sent to Madigan General Hospital to received treatment. (He was stationed at Whidby Island in Washington at the time). He was given a medical discharge from the Army in 1947.

During the first few years these attacks occurred periodically. Rather more frequently at first, but intermittantly throughout the years. I was cognizant of these attacks because my wife and I were called upon to assist them or the children during these episodes. Al stubbornly refused to be hospitalized for them, stating that he had the necessary medicine (quinine, I believe) to treat himself. (I felt this to be a mistake on his part and told him so)! The attacks seemed to run the same course, headaches, chills, fever and subsequent weight loss. I couldn't possibly pin point the time on them with the exception of those which occurred invariably after the loss of each of their four children. The week of September 5 through the 12 of 1949, (after the death of our first grandchild Paulette). Jackie told us he'd had another the following May. 1949, again in July of 1951, after the loss of their daughter Michele, on August 8, 1955 following their son Michael's passing, and in August of 1961, upon the loss of their last daughter Rebecca. Several during the years of 1963, 1965, '68, and in 1972.

There were other instances I was told of but didn't personally witness.

Of far more concern to me were the repeated attacks he suffered, which had all of the classic symptoms of a heart attack, pain in the chest wall, numbness and pain in his left arm, etc., which were (and probably still have) not been properly diagnosed.

Our family physician, Dr. Wendall J. Thomson felt, after considerable testing and many examinations, x-rays, etc, that it was 'probably' severe muscle spasms caused by a complete lack of calcium in his system due to his four years of extreme malnutrition

These attacks have increased in severity over the years necessitating hospitalizati and treatment in both Ogden hospitals and also at the Veteran's Hospital in Salt Lake Cit I was aware of these attacks as we were given the care of our grandaughter Robin, and wer living in their home.

These health problems were of considerable distress and caused my son-in-law grievous anxiety because of his loss of work and income.

The loss of our four grandchildren caused us great anguish of mind and spirit (for Al and Jackie as well as for ourselves). The congenital anomalies which claimed the lives of each of these children were incomprehensible to all of us. Family medical histories we examined and -then family genealogy records were researched as to illnesses, causes of death, etc. There were no anomalies, nor malformations. Considering that this is quite a prolific family this information seemed to be significant. Al's family also went throu considerable reexamination and evaluation. He is also from a large and healthy family, and there were no abnormalities on his side either.

The consulting specialists kept returning to Al's Army history, where he had been, experiences, etc. When they discovered that he had been in a concentration camp in Nagoya, Japan, when both of the Atomic bombs had been dropped in Hiroshima and Nagasaki, -and had been forced to work in and around the area, they interviewed him in detail. It was their considered opinion that because of his exposure to radiation and the fall-out food and area contamination, etc that there was a 'possible mutation' of the genes, and, that in nine out of ten births, there was a probability of abnormalities. It was something of a miracle that of my daughter's six pregnancies, their fourth daughter Robin was to be bo normal. The doctors advised Al and Jackie of this, and told them 'no more children.'

Our family physician had felt from the outset that this was the cause of all of the problems, although he did not voice this opinion until after the specialists arrived a their prognosis. After his initial examination of Al, he told my wife and daughter that "he felt that Al might continue to do fairly well for about ten years or so, but then he would start having problems and would rapidly begin to deteriorate, experiencing all sort of aches and pains. His system has taken far too much punishment externally as well as internally to expect anything else. I can't in all good conscience certify him for a health nor life insurance policy, nor would any other physician do so." (Incidentally Al 'was' turned down for Mortgage and life insurance, which confirmed what our own Doctor had said). Our Doctor's diagnostic prediction has proved to be only too accurate, as Al's subsequent medical history has proven.

It has been apparent over the years that Al distinctly suffered a myriad of 'after-effects' of his imprisonment other than actual- physical pain. His extreme nervousness, and anxiety, his memory loss (spoken of earlier) which comes and goes, caused him untold misery and financial loss. He has always worked on a commission basis, and although we all endeavored to assist him with his memory by keeping note pads, etc., with his clients names and appointments, if he lost his own book, he would 'forget' to call home to ask for the identical information there, and lose his commission. Often he would work with peop for weeks and not recall their names--always remembered faces, however.

I noticed a drastic change of personality in Al over the years caused by this constant anxiety and stress over his health, loss of work and of course the trauma of the children's deaths. True to his nature he never openly complained nor even discussec these problems. (I was therefore often unaware of these situations until it was brought my attention by my wife or daughter-as an 'after the fact' occurrence, with the exceptic of those episodes I have previously noted).

It has been my personal observation that Al's withdrawal and refusal to acknowledge his problems is directly related to his imprisonment, where circumstances dictated that h remain impassive and reticent in order to survive. Consequently he becomes his own wors enemy by 'holding everything in,' certainly it only heightened his emotional trauma and could only have contributed to aggravating his ulcer condition.

An insight into his character occurred when in 1959 his pension was reduced. My daughter was truly concerned about this as it was clearly apparent, that far from improvi his health was deterioriating. She urged him to appeal this decision, noting that our family Doctor would certainly verify his own rather bleak prognosis of Al's condition. But Al's reaction (typically so, I might add) was that as "long as I'm able to work it's not that important right now, besides they might give that 10% to some other Veteran whc needs it worse than I do at present."

In view of his exposure to the Atomic bombs it is really not too surprising that he has subsequently developed cancer (Multiple Myeloma). What is unusual is that so man of the Atomic war Veterans are suffering from the same type of cancer, the significant aspect being that this particular form of cancer is only 1% of all cancer types.

Since I am now living in Arizona I have not seen too much of Al since the diagnosis of his cancer. But He has accepted it with that same stoicism which enabled him to survive during his incarceration.

He is now unable to work because of the acceleration of all of his previous disabilities, which combined with this latest trial, have served to incapacitate him.

It is my considered opinion that you- should certainly review his case giving careful consideration to those early medical diagnosis which forced him from the Army as 'physically unfit' with a medical discharge. (Those Doctors knew what was in store fo him or he would not have been so classified (50% disabled) at that time). It is only reasonable to assume that such a condition would continue to accelerate and worsen, as i has.

It is my hope that you gentlemen will award this man the compensation which he need to exist on. Through his deprivation, incarceration and suffering not only through thos almost four years of hell, but his continual struggle with those residuals over the year entitles him to special consideration.

Sincerely,

Leith Corbridge

Leith J. Corbridge
425 North Vineyard
El Madrid Court Apt. # 5
Mesa, Arizona. 85201.

My Commission Expires Mar 23 1985

On January 9, 1957 I, Robin Maxwell Stepher was born, the fourth of five children, to Albert R. Maxwell and Jacqueli Corbridge Maxwell. Of five children, I was the only one born free of congenital b anomalies, the others dying in infancy and early childhood.

There have been several occasions, throughout my life, in which my father's health has been seriously threatened. The incidences have been numerous, however, there are three occasions, that are vivid in my mind, that seem to best characterize the ongoing struggle my father has had with his health.

My earliest recollections of my father's illnesses are when I was around eight years of age. I was told that my father had a form of leukemia and was not expected to live. The trips to the Veteran's Hospital in Salt Lake City were numerous. After some time my father's condition miraculously cleared up and he was able to return home. At a very early age I had faced the possibility of losing one of the most important people in my life. Naturally, my father's health has been of great concern to me ever since.

The Christmas of my 13th year was also filled with hospital visits. This time the visits were to the Mckay Dee Hospital in Ogden, Utah. My father was admitted with severe pains in his chest. This chest pain was a common occurrence, which many times my father would choose to try and ignore rather than to seek medical treatment. I could tell by watching my father walk that he was suffering from chest pains. The pain was usually accompanied with extremely high fevers and swelling of the hands and feet. There seemed to be nothing my father could do to ease the pain other than wait until it passed. It was very frustrating and painful for me to have to witness these numerous attacks.

One particular episode that was very frightening to me occurred when I was sixteen years old. We were returning from Ft. Collins, Colorado and had stopped for the night at the Little America Motel in Wyoming. My father had fallen asleep while my mother and I were watching television. We heard some tossing and turning and faint mutterings, and assumed that my father was talking in his sleep. Soon, however, the mutterings turned to anguished screams. Much of what he was screaming was intelligible, and was directly related to the experiences he had as a prisoner of war and during the Bataan Death March. I was terrified and panicked by this attack. My mother reassured me that this would pass. She said that when she and Dad were first married episodes like this happened quite frequently.

There were many times my father experienced severe back and head pains which were also accompanied with the high fever. These symptoms never seemed to be related to any sort of flu virus, but were just the same symptoms that had been manifested so many times before. These sicknesses have kept my father from reaching many of his career objectives, as much of his time was spent convalescing.

I can't possibly express the love and concern I feel for my father. I feel sorrow for the suffering my father has endured, and regret that his illnesses have kept him from enjoying and participating in many of the things he would have chosen to do. I respect the admirable manner in which he has dealt with his illnesses. I have the upmost concern for both my parents well-being. It is my hope that you will carefully review this case.

Johanna Kats 11-23-1982

Notary Date

OFFICIAL SEAL
JOHANNA KATS
NOTARY PUBLIC-CALIFORNIA
Principal Office in ALAMEDA County
My Commission Expires Sept. 3, 1983

Robin Maxwell Stephens

Robin Maxwell Stephens
3206 Jose Ct.
Hayward, CA. 94542

Veterans Administration
Veterans Adjudication Board

December 5, 1982

Gentlemen,

Almost a year ago I wrote a letter to the gentlemen of the Veteran's Adjudication Board. It was a harried, emotional plea for consideration for a claim for my husband Albert R. Maxwell. He was incapacitated and unable to do it for himself and so I undertook the task. The result was a denial. Understandably, upon their parts, because I was so ill-prepared with nothing at my disposal to document his case.

We have spent the ensuing ten months requisitioning medical records, visiting his Army buddies and perusing all of the records so obtained to compile and substantiate with testimonies, depositions and medical opinion an appeal for his claim.

Upon being allowed to read Albert's diary of some thirty five years entries, I was appalled to discover how much of his illness I had been unaware of. Likewise, I was stunned at the dozens of medical examinations and visits to the Veteran's Hospital that I'd not been advised of, and, at the same time seeing diagnosis and notation confirming all of the problems year after year which have beset him. Having said this, I would like to preface my remarks concerning my husband by stating that irregardless of what he wrote (in his diary) or said to his Doctors, that, from the first moment of our meeting until the present time, Albert has never complained about his health, his past circumstances, nor his situation in life (with one notable exception, which I will detail later on). It is simply not in his character to do so. The only way I was even able to recognize that problems did exist was through living with him and constant observation. Even then, unless he was physically unable to refrain from expressing pain, much of the time I was unaware the situation existed until it became an aggravated one.

My first impression of Sgt. Albert R. Maxwell was that of a healthy, ruggedly handsome mature man (I assumed him to be about thirty-five years of age). His countenance presented the picture of a completely carefree, happy, sunny dispositioned individual. He exuded supreme self-confidence and possessed the most 'positive' attitude in his approach to life of anyone I'd ever known. There wasn't one iota of negativism about him, then, or now. He expressed such appreciation for everything, his surroundings, the weather, the scenery, his work, the simplest of meals, in short, everything that society takes for granted. The smallest courtesy was of paramount importance to him. My family and friends dubbed him "the Eternal Optimist." He was a gentlemen, chivalrous, in an 'old world' manner with women. He was very direct, candid and frank in his behavior. He completely captivated people with his charm and friendliness. Needless to say I was completely mesmerized by him, even though I was engaged at the time.

His determination to win my love was impressive. I believed that if he applied this same perserverance to everything else, there was literally nothing that he couldn't and wouldn't accomplish in his future life.

I broke my engagement and began dating Al. I was surprised to learn that he was only twenty-five years of age (although looked older than my Father, who was forty one at that time). As our relationship progressed and we began socializing, I discovered aspects of his behaviour that I found inexplicable and intolerable. It was a complete contradiction of the person I'd thought him to be. The candidness I'd found so appealing, was genuine enough, as long as it didn't touch any part of his personal life. About the latter he was completely uncommunicative. He was a complete paradox to me.

I wondered what he was trying to hide from me. He began missing dates and appointments that he himself had made, with no logical explanations, seemingly unconcerned about his forgetfulness. Although he had shown me tenderness, I observed that he displayed great insensitivity towards other's painful incidents. He seemed callous and oblivious to many tragedies around us.

I was completely baffled by him, bewildered and unhappy, in tears most of the time. I knew that he loved me and that he was suffering also, but felt that there was no trust and too much left unexplained between us, to further such a relationship.

As both Albert and my Father have already recounted, there was obviously a logical, albeit heart rending, explanation. When he could finally bring himself to disclose it, the situation resolved itself and we were married.

Again I discovered disparagements. The apparently healthy man I thought I'd married seemed plagued by illnesses. I'd been informed of occasional headaches and maybe an attack of malaria ("maybe" turned out to be 'recurrent' malaria). But I was completely unprepared for his terrifying nightmares. Our nights were filled with his screams, like a soul in torment. The next morning he didn't even recall having them. These episodes would be followed by nights of insomnia and violent headaches, then repeated nightmares again. He had omnipresent aches and pains throughout his body, arms, legs and back, but refused to acknowledge the fact. I knew that he was having real problems, but he seemed to feel that by not recognizing the situation, or ignoring it, it didn't exist, or would resolve itself. Of course it never did, because the underlying cause was never recognized nor treated.

He was informed that he simply had a 'bad case of nerves', the rest of it was all in his head, he should get more rest and not worry so much!

We were told that the malarial attacks would diminish, but they continued reularly, so that he was ill for the next year and a half with these attacks. His eyes were bothering him so much that they required an operation. Shortly thereafter he was given a medical discharge from the Army with a fifty per cent disability.

He was heartbroken with this action as he had wanted to make the Army his career. I believe that part of his unhappiness lay in the fact that he now had to acknowledge what the Army doctors had determined, that he was 'not medically fit.' (He spent the next twenty five years trying to disprove that medical or[illegible] becoming a compulsive work-aholic, giving one-hundred per cent of himself at [illegible] times. He never had a Boss who didn't recognize him as their most valued employee acknowledging it with their continuing friendships and support throughou[illegible] the year[illegible]

His health continued in the same manner. After some time I began noticing a 'pattern of sorts.' Whenever there was a stressful situation, the headaches became more pronounced, the insomnia and nightmares accelerated, soon followed by an attack of malaria. These attacks were accompanied by chills, sweats and high fevers that produced delerium. During these interludes I was horrified at some of the disclosures that poured out. All of the incidents he refused to discuss surfaced at this time. Even as a layman, I realized that I was only seeing the "tip of the iceberg."

Conciously, Al only let us see what he wanted us to see. He had contained and repressed his innermost thoughts, feelings and illnesses, through necessity, throughout his incarceration. He, in effect, turned himself "off" from the world. He'd done it so repeatedly that it had become an integral part of his behavior and character and he couldn't break the pattern he'd established.

it also contributed to another major problem that was, and is, a great source of annoyance, embarrassment and continual distress to him; his memory lapses. This ability to "turn off" probably enabled him to preserve his life, and most certainl saved his sanity, by providing a mental escape from the daily horrors and hell he endured. The doctors explained to us that this process of 'negating everything' was so successful it almost caused a 'total' amnesial block (not an uncommon occurrence among P.W.W's, tragically, sometimes, leaving them totally mindless). Al's memory lapses were a constant worry to him, causing not only extreme mental aggra ation and anxiety, but also costing him dearly financially, in lost commissions, because of his inability to remember appointed times and places.

As his medical records document: Repeated attacks of agonizing chest pains, listed as 'unknown etiology', undiagnosed, therefore unpreventable, therefore not treatable.--Swelling of his hands and feet--Allergies, and rashes, (prevelent inte mittantly since his assignment for 'clean up' detail after the bombings), the latt also termed 'unknown etiology'---His eyes have continued to atrophy, almost glued shut each morning with a 'pus-like' extraneous matter----His headaches have inten sified and his insomnia continuous--Aches and pains in his bones, throughout his body, specifically the back area--Peptic, duodenal ulcer attacks--Notation of an enlargement of his heart, possibly attributable to beri-beri heart disease, becau of the damage done to his system by this disease---Lastly, an irreversible form o cancer, Multiple Myeloma. These numerous physical disabilities have increased hi anxiety and stress alarmingly. (This has been reiterated by me, because I have personally witnessed all of the above, and have lived with it present throughout our entire married life).

I noted earlier that there was one problem that Al was very vocal about, and that was his sterility. It was the one area that he would seek after medical hel When, two years after our marriage, we were blessed with a beautiful baby girl, A reaction was indescribable. The shell, he'd encased himself in, slowly began to op and the person I knew him to be, emerged. I've never seen a father exhibit such adoration over a baby. She became almost the 'sum total' of his exitence. He certainly was hers' . Her little face turned to him, as constantly, as a flower the sun. I was so thrilled to see him so openly displaying his emotions, finally, there appeared the 'vulnerability' that is present in everyone else.

Our joy was short-lived. She was born with a congenital anomaly, an extreme rare heart condition, Tetralogy of Fallot, and, as is usual in these cases, there was also another anomaly, an irregularity of the rectum. Her life expectancy pla at less than a year, with no viable alternative. Medical explanation: "just one those rare happenings." It couldn't happen again.

We were urged to have anther baby. We had a little boy--born with the identi heart anomaly. Because the mathematical odds against such an occurrence were as- nomical the medical community in our area evidenced great interest in our case. As has been related we were subjected to intensive medical and historical researc in depth, with the doctors particularly intrigued over the part Al's radiation- exposure 'may' have played in the babies' anomalies. At that time they were divi in their opinions, and again we were encouraged to have a family. With, unbeliev the same results. Congenital anomalies with resulting deaths occurring in four of our five children. (Also, one miscarriage, with a terribly mutated fetus).

I must interject, that, after our family physician had examined Al and treated him at various times, compiled his medical and service history, and after the bi of our second child, he was of the decided opinion that Al's radiation exposure the decisive factor in the determination of the abnormlities. He correctly diag and predicted the inevitable outcome of our tragedies (although at the time his opinion was in the minority and he was overridden). He also expressed his fear that Al might be a possible victim of cancer (which has since transpired).

When one sustains the loss of a child it produces such anguish of mind and spirit, that the pain is a physical one. Multiply this four times over, coupled with the countless suffering Al had already endured, the cost to his well being was staggering.

Many times in the attempt to deal with such tragedies, people draw completely apart from one another. As Al was accustomed to such withdrawal, I was frantic about him. I needn't have worried. With each succeeding trial we were drawn closer together, and with the miraculous birth of our daughter, Robin, we finally began to experience the joy of a family. Everthing we had hoped and prayed for wa embodied in this one child and she has surpassed our every expectation. Beautiful spirit, face, manner and deportment, she has expressed such love and filial devoti that she has over the years assuaged the grief we'd sustained.

All of the vicissitudes and exceptional trials of Al's life have produced a ma of sterling character and qualities.

As a father, he was compassionate, loving, understanding and directly involve with the rearing of his children (not just a week end father). Nothing was too tr in their lives to go unnoticed by him. He adored them, and was worshipped in retur He was literally a "Pied Piper" with our own, and everyone else's children.

As a man, I respect and admire him as no other person in this world. He is: al very best friend.

He has been the tenderest, most loving, attentive and considerate of husbands supportive of me in my every endeavor, protective, to the point of always hiding all unpleasantness from me (as has been noted). In spite of all of our difficult he's surrounded me with such an aura of love and security, he has made me feel a queen among women. I feel blessed to have been chosen by such a man to share his life with him. After thirty five years he is still my 'knight in shining armor,' and I will love him as long as the Lord allows me time to do so.

I respectfully request that you grant him the compensation that is due him, in order that he might have a dignity and quality of life in the time remaining to him.

Thanking you for your time and consideration, I am,

Sincerely,

Jacqueline C. Maxwell

(Mrs. Albert R. Maxwell).

Regional Office

125 South ~~State~~ Street
Salt Lake City, Utah 84138

Veterans Administration

524/5-76

In Reply Refer To:
341/21
C 9 594 221

Albert R. Maxwell
704 Eastside Drive
Layton, UT 84041

Dear Mr. Maxwell:

Pursuant to your request, a personal hearing has been scheduled for you on the date and at the time shown below at the Veterans Administration Regional Office on the fifth floor of the Federal Building, 125 South State Street, Salt Lake City, Utah.

Day: Wednesday

Date: March 17, 1982

Time: 10:00

Our records indicate you have appointed the Disabled American Veterans as your personal representative. Please contact your representative in Room 5239 prior to the time the hearing is scheduled. He will notify the Veterans Administration of your appearance.

The Veterans Administration has no authority to pay any expenses incident to this hearing. Therefore, any expenses in reporting must be paid by you. You must make your own arrangements for any witness you desire to testify.

In the event you are unable to appear at the time specified, please notify this office in writing prior to the scheduled hearing.

There are several two hour parking spaces reserved on the Federal Building grounds against the south wall as you enter through the gate off the State Street entrance. This is for the convenience of visitors. You are cautioned, however, to abide by all signs in the areas as some spaces are reserved for other agencies.

Sincerely yours,

Wm F X McConnell

Wm. F. X. McCONNELL
Adjudication Officer

Enclosure: VA Form 1-4297

cc:
Disabled American Veterans

Veterans Administration
Regional Office
Federal Office
125 South State Street
Salt Lake City, Utah 84111

Regarding a claim for disability
for
Albert R. Maxwell

December 11, 1981

Gentlemen:

Upon his re-admission to the Veterans Hospital, my husband, Albert R. Maxwell's claim for increased disability comes before you for consideration.

This time I would like you to have a few more pertinant and personal facts and data with which to review this claim.

In times (and years) past he has been admitted and re-admitted to the hospital for basically the same reason--symptoms of agonizing pain throughout his body. He has been examined each and every time with complete 'work-ups' of X-rays, blood tests, upper and lower G.I. series, EKG's, EEKG's, liver, Spleen, and kidney tests, urine analysis. etc,etc with the same inconclusive results

The doctors review his voluminous medical file, his past medical history documentatir Extreme malnutrition (Japanese P.O.W. for 4 years), residuals of Beri-Beri, Dhenghi fever amoebic dysentery, Palegra, blinding headaches(shrapnel wounds in his eyes, scar tissue removal--22'70 vision) and lastly Malaria, and arrive at the 'probable'explanation that it is undoubtedly some sort of amoebic parasitic bug that some of the G.I.'s picked up in the South Sea Islands, that it lodges in the intestinal walls, lays dormant for years then suddenly it re-activates causing debilitating pains and illness to follow.
They have arrived at this conclusion because these same symptons started happening to the G.I.'s with much the same medical history and geographic military history as Albert's This disease appeared from twenty-five to thirty years later in some of these men. So tha even after thirty-five years it is still uncatagorized.

I would like to say a few words about the Malaria which has attacked his body over an over again. I along with many other 'layman' assumed that eventually this illness would subside and in effect 'go away' in time. But of course that has not happened, oh, maybe for a couple of years or so and then any sort of weakness or mental trauma seemed to 'trigger' it off with devastating effects. His fevers would run so high they wouldn't register on the themometer, and caused delirium that lasted for hours, and resulting in a twenty-five pound weight loss over a three day period of chills and sweating, leaving him with blinding headaches.
(Many times the 'mental trauma' I've spoken of was caused by the deaths of one of the four children we've lost (due to congenital disorders which many of his doctors have felt was caused by his possible exposure to the effects of the H-bomb which was dropped near his prison camp in Japan).

He stopped entering the hospital each time the Malaria occurred because we knew that it would run its'course and he would be back on his feet. In the interum, because he is, and always has been self-employed, our income would cease and we would spend the next couple of months 'catching up' with our financial obligations. Over the years all of the various illnesses have almost completely 'swallowed up' all of our savings.

He has always been so stoic, self-effacing and patient in his acceptance of these'bout as something to be expected and endured without complaining about them. But the periods of pain and non-roductivity have increased over the years without these important facts ever having been brought before you simply because he didn't want to complain!

As a result all of this information has never been brought to your attention and a a consequence his claim has never been strengthened or increased.

During the past year and a half he has not been able to work more than four months, and tha not consecutively. He has been suffering from pain (extreme pain) in his lower back anc shoulder for which he has been recieving treatmont for a possible 'arthritc' condition, which since his admission to the hospital has been positively and correctly diagnosed as Multiple Myeloma (cancer of the marrow of the bone) a Lukemia of the bone.

He has been advised by the doctors that because of the pain and the treatment thereof, radiation and chemotherapy, etc, he may be unable to work indefinitely, and indeed mayt totally disabled.

Therefore because of this latest deterioration in his condition coupled with his prior medical history, all service connected and directly attributable to his imprisonment anc incarceration and deprivation as a P.O.W. we respectfully submit this claim to you and implore you to grant him the Maximum amount that he might have some 'quality of life' in the remaining time he may have left to him. The doctors have told us that even with effective treatment he may expect his life span to be shortened by five to ten years, ar as he is now 60 years old this doesn't leave him with much expectation.

It is one thing to type this data so that you may have a written report before you, but you can only imagine the heartache and anguish that all of this has brought into our lives.

I wish to thank you for your consideration of his claim, and for the service you perform for him and veterans everywhere.

I also wish to commend the Veterans Hospital for the wonderful care and treatment accorded to my husband over these thirty five years. There has never been a time that he hasn't received the finest attention.

I also wish to thank all of the dedicated physicians attached to the hospital, in particular to Dr. Romney who has treated my husband all of those years and to Dr. Jense in outpatient clinic for his prompt action in helping to correctly diagnose this last tragic disease.

Very Sincerly,

Jacquiline E. Maxwell

on behalf of my husband Albert R. Maxwell.

A. R. Maxwell
704 Eastside Drive
Layton Utah, 84041

Regional Office
125 South State Street
Salt Lake City, Utah 84138

Veterans Administration

In Reply Refer To: 341/212
C 09 594 221

Albert R. Maxwell
704 Eastside Drive
Layton, UT 84041

Dear Mr. Maxwell:

Careful consideration has been given to the current evaulation of your service-connected disabilities and your request that service connection be established for multiple myelomas, a degenerative joint disease, and a peptic ulcer. We have reviewed all the evidence of record, including all military records and the report of your most recent treatment at the VA Medical Center, Salt Lake City, Utah, for the period November 9, 1981, to December 12, 1981.

The medical evidence of record would not support a grant of service connection for the disabilities of multiple myelomas, a degenerative joint dsease, or a peptic ulcer. An increase in the evaluation of your disabilities already established as service connected is not warranted.

We note that you would like a personal hearing at this Regional Office to present additional information or evidence in conjunction with your claim. Your request has been referred to our Rating Board, so they may make the necessary arrangements for such a hearing. You will be receiving additional instructions concerning this hearing, in the near future.

Sincerely yours,

Wm. F. X. McConnell

Wm. F. X. McCONNELL
Adjudication Officer

Enclosure:
VA Form 1-4107

cc:
Disabled American Veterans

NATIONAL SERVICE OFFICER
GEORGE L. CAREY

AMERICAN DISABLED VETERANS

NATIONAL SERVICE DEPT.
1701 18th St. N.W., Washington 9, D.C.

NATIONAL SERVICE OFFICE
VA Regional Office
1750 S. Redwood Rd.
Salt Lake City 4, Utah

March 30, 1959

Mr. Albert R. Maxwell
P. O. Box 543
Ogden, Utah

C 9 594 221

Dear Mr. Maxwell:

Your case came through the Rating Board today, and based on the examination which was given you your compensation has been reduced from 50% to 40%. The conditions that were considered improved were the scars on your leg and the vision of your eyes. Both of these were rated at 10% each, and in order to maintain a 50% rating we will have to show that both of these are still at least 10% disabling.

Whether this can be done I don't know. You are still rated at 30% for the residuals of beriberi, and at 10% for conjunctivitis. In the event you feel these other conditions should not have been reduced we will require medical evidence to rebutt the findings of the VA doctor.

Enclosed for the assistance of your doctor is one of our Physician's Affidavit forms which need not be notarized. The only conditions we are interested in right now is that of your eyes and the scar on your leg.

I can take no action until I receive this needed evidence from you.

Sincerely,

GEORGE L. CAREY
National Service Officer

GLC:kt
Enclosure

Veterans Adjudication Board
Veterans Administration

Re: Albert R. Maxwell
V.A. Compensation Clai

December 5, 1982

Gentlemen:

I had a personal hearing scheduled with the Veterans Adjudication Board on March 17, 1982 to appeal the denial of my claim for increased compensation.

I contacted my representative with the D.A.V., Mr. George Carey and requested that he postpone the meeting and file a Notice of Disagreement, as I needed additional time for the preparation of my case. (I had been hospitalized almost continously for two months and unable to do the required research).

I assumed that Mr. Carey had done what he agreed to do. I waited for over six-months only to discover that he had retired. I further discovered that instead of of filing the Notice of Disagreement, he had simply canceled my Personal Hearing, and done nothing else regarding my case.

I was never notified as to the status of my case.

I understand that my case is retroactive to March 17, 1982, and am filing my appeal at this time for total disability.

Sincerely

Albert R. Maxwell

Albert R. Maxwell

EXHIBIT C

Form Approved
OMB No. 76-R0335

VETERANS ADMINISTRATION	SOCIAL SECURITY NO.	VA FILE NO.
STATEMENT IN SUPPORT OF CLAIM	520-10-1098	C- 20949094

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME-MIDDLE NAME-LAST NAME OF VETERAN (Type or print)
Albert R. Maxwell

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I wish to file my claim for a compensation increase under the former prisoner of war act of 1981 and public law 97-37, for the ailments listed below that have been shown to be prevalent among ex-pow's and to be caused by malnutrition and stress. I am filing for total disability based upon the following ailments: (listed (are prescribed Rx's for the treatment of same):

1- Intestinal problems (Peptic ulcer, Duodenal ulcer, excessive gastritis, and many periods of Diarrhea and constipation) (Rx's Cimetedine, Tagamet, Simeth--cone, Magnesium Citrate).

2- Muscle spasms, Charley horses in feet, hands, calves, thighs, chest and back. (Rx's Butazolidin Alka and Clinoril).

3- Chronic headaches and insomnia. (Rx's Flurazepan).

4- Optic Atrophy and diminishing eyesight (phlegm on eyelids every morning). (Rx's Sulfacetamide 10% op. Sol.). Eyes were operated on in 1947.

5- Edema (Beri-beri) in hands, feet, calves, and stomach. (Lasix and Potassium Chloride).

6- Arthritis in lower back and shoulders. (Rx's Ibuprofen, Tylox and Motrin).

7- Extreme rashes, itching and swellings. (Rx Hydroxyzine).

8- Anxiety neuroses, (nightmares, irritability, nervousness, sweats over upper body and Anti-social behavior). (Rx's Valium and Flurazepan

9- Hayfever and Sinus problems (Rx's Actifed, Dinetapp and Drixoral).

10-Malaria (Rx's Quinine and Atabrine).

11-Multiple Myeloma (Rx- Radiation Therapy, Rx's Cytoxin and Prepnisone and Tylox

The therapy treatment consists of Chemotherapy every three weeks for four days. Because this disease manifests itself in spontaneous fractures through any undue strain or inadverdent action, it has made it virtually impossible for me

(CONTINUE ON REVERSE

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED	SIGNATURE
12-2-82	Albert R Maxwell

ADDRESS
3206 Jose Court Hayward, Calif. 94542

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1978 21-4138

EXHIBIT D

to work even part time.

12- Varicose Veins (necessitating vein ligation on left leg in 1958).

All of the above ailments have been an integral part of my life over the past years and can be directly attributed to my forty-two months as a Japanese P.O.W.

The statement of the Former Prisoner of War Act of 1981 and Public Law 97-37 I believe entitles me to be upgraded to total disability (instead of the 40% that I now have).

At the time of my discharge from the Army I was granted a 50% disability and my health has continually deteriorated to the point of 100% disability at the present time.

All of the above statements (physical disabilities) are corroborated by Medical documentation, depositions and notarized testimonies contained herein.

Form Approved
OMB No. 76-R033

VETERANS ADMINISTRATION	SOCIAL SECURITY NO.	VA FILE NO.
STATEMENT IN SUPPORT OF CLAIM	520 10 1098	C-9594221

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME-MIDDLE NAME-LAST NAME OF VETERAN (Type or print)
ALBERT MAXWELL

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I HAVE A PENDING CLAIM TO ESTABLISH SERVICE CONNECTION FOR VARIOUS DISABILITIES ASSOCIATED WITH MY PREVIOUS JAPANESE PRISONER OF WAR EXPERIENCE AND EXPOSURE TO LOW LEVEL RADIATION. THESE WERE PREVIOUSLY OUTLINED.

I WAS SCHEDULED FOR A PERSONAL HEARING AT THE VA REGIONAL OFFICE SALT LAKE CITY, UTAH 3-17-1982. I REQUESTED TO HAVE THIS HEARING DELAYED SO THAT I COULD DEVELOPE MY CASE FURTHER.

MY CLAIM MAY HAVE BEEN INADVERTENTLY DELAYED BY IMPROPER ACTION TAKEN BY THE D.A.V. MY STATEMENT OF 12/2/1982 WAS WITH THE INTENT TO CONTINUE MY APPEAL. THE VA claims folder should be obtained from SALT LAKE City VA REGIONAL OFFICE AND ROUTED TO THE D.A.V. SERVICE OFFICE IN SAN FRANCISCO FOR FURTHER REVIEW.

(CONTINUE ON REVERSE)

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED	SIGNATURE
1/4/1983	Albert R Maxwell

ADDRESS
3206 JOSE COURT HAYWARD CALIFORNIA 94542

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1978 21-4138

EXISTING STOCKS OF VA FORM 21-4138, JUL 1977, WILL BE USED.

EXHIBIT E

issues.

1. service connection for
   a) gastro intestinal
   b) hemorrhoids
   c) Post traumatic arthritis Rt shoulder, lumbar
   d) Post traumatic stress
   e) Multiple Myeloma. check radiation exposure
   f) pain Right Quadrant

Dept. Veteran benefit Circular 9-27-82
21-81-9

Page 1 Para 4 line 2 delete May be considered
insert shall be considered

San Francisco

4150 Clement St - 221-4810

Geary Main st
left to Bay Left
GOLDEN GATE
19th St 3rd
Clement

Board of Veterans Appeals Washington, D.C. 20420

Veterans Administration

JAN 22 1982

Mr. Reason F. Warehime, Jr.
P. O. Box 398
Riverdale, CA 93656

Dear Mr. Warehime:

We are writing you concerning your appeal which is in the Board for consideration.

At this time, we would like to clarify your representation. We note that you appointed the Disabled American Veterans as your accredited representative in September 1976. However, Attorney Robert T. Durbrow, Jr., has been assisting you in the prosecution of your claim. Veterans Administration Regulations provide that only one service organization, individual attorney or agent will be recognized at any one time in the prosecution of a claim for one specific benefit. We also note on your Substantive Appeal dated May 9, 1981, you indicate you do not desire representation.

If you desire to appoint Attorney Durbrow or another attorney as your representative, he should submit a statement certifying that he is representing you during the prosecution of a claim. This statement can be in letter form over his signature. You should submit a statement designating whether the attorney will represent you in all matters, or whether representation is limited to your current appeal. For your information, the maximum attorney fee under the law (38 U.S.C. 3404) is $10.

If you wish to designate an agent to represent you, the enclosed VA Form 2-22a should be completed and returned to this Board. This form may also be used to appoint an attorney.

Various accredited service organizations provide free representation on request. If you wish to appoint a service organization other than the Disabled American Veterans to represent you, the enclosed VA Form 23-22 should be completed and returned to this Board. On the back of the form is a list of recognized service organizations. For your convenience, I have checked those with representation at the Board of Veterans Appeals.

We are deferring our study for 20 days pending receipt of your reply. If we do not hear from you within this time, we will assume that you desire to retain the Disabled American Veterans as your accredited representative. Thereafter, your appeal will be returned to its regular order

In Reply Refer To: 014H
C 13 005 384

EXHIBIT F

of consideration. You will be notified of our determination as soon as it is entered.

Sincerely yours,

KENNETH E. EATON
Acting Chairman

Encl. 2
VA Form 23-22
VA Form 2-22a

2CC: Honorable Alan Cranston

2CC: Honorable Tony Coelho

CC: DAV, Washington, DC

CC: DAV, VARO, San Francisco, CA

CC: Mr. Robert T. Durbrow, Jr.
Attorney at Law

Mr. Robert T. Durbrow, Jr.
Attorney at Law
4270 North Blackstone, Suite #216
Fresno, California 93726

Dear Mr. Durbrow:

Your recent letter indicates that you are authorized to represent your client in the prosecution of Mr. Warehime's claim for service-connection before the Veterans Administration.

There is an outstanding power of attorney executed by your client in favor of the Disabled American Veterans. The current power of attorney must remain in effect until we have received a statement, signed by your client, showing the nature and extent your representative capacity. This statement should also state whether the prior power of attorney is to remain in effect or be revoked.

Pending receipt of the statement, we will furnish you, for a reasonable period, carbon copies of correspondence from this office to your client relating to the pending claim.

Laws, regulations and procedures relating to veterans benefits are codified in Title 38, Code of Federal Regulations. Sections 14.629 through 14.365 set forth provisions relating specifically to agents. Your attention is invited to particular to Section 14.634.

We welcome the opportunity of cooperating with you in the interests of your client.

Sincerely yours,

T. A. VERRILL
Adjudication Officer

cc:
Disabled American Veterans
Reason F. Warehime

343/215A C-13 005 384 WAREHIME, Reason F.

EXHIBIT G

Regional Office

211 Main Street
San Francisco, CA 94105

Veterans Administration

Mr. Reasons Warehime, Jr.
P. O. Box 398
Riverdale, CA 93656

Dear Mr. Warehime:

We have your substantive appeal wherein you indicated you wanted a personal hearing.

You are, of course, entitled to a personal hearing. It is, however, our responsibility to advise you of certain facts. First, due to the backlog of scheduled hearings, it would be most likely several months before a personal hearing could be held, and with the time allowed for typing the transcript of the hearing, it could result in a substantial delay in submission of your appeal to the Board of Veterans Appeals in Washington, D.C. Secondly, a personal hearing in the Veterans Administration Regional Office, San Francisco, would be before the local rating board which has evaluated your case previously, not the Board of Veterans Appeals personnel. Thirdly, certified statements carry as much weight as in-person testimony. Fourthly, if you do not have new and material evidence, preferably medical, but would be merely restating previously furnished information, no change could be made based on the personal hearing alone.

If you still wish to have a personal hearing, please advise us within 30 days, and we will be happy to schedule one for you. If we do not hear from you, we will assume you wish your appeal to be certified to the Board of Veterans Appeals without further delay for a hearing.

Sincerely yours,

T. A. VERRILL
Adjudication Officer
cc:
Disabled American Veterans

In Reply Refer To: 343/215 C-13 005 384

EXHIBIT H

Form Approved
OMB No. 76-R0138

VETERANS ADMINISTRATION	SOCIAL SECURITY NO.	VA FILE NO.
STATEMENT IN SUPPORT OF CLAIM	572-24-1420	XC-14 092 808

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (CX1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)

STANLEY BRYAN WILSON

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

REFERENCE IS MADE TO YOUR PRINT OUT 21-8332a 4 21/24 DATED 21 JANUARY 198~ WHICH TELLS ME MY HUSBANDS DEMISE WAS NOT DUE TO A SERVICE-CONNECTED DISABILITY.

I OBJECT TO YOUR FINDING SINCE MY HUSBAND WAS EXPOSED TO RADIATION AND I THEREFORE FILE A NOTICE OF DISAGREEMENT

(CONTINUE ON REVERSE)

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED	SIGNATURE
January 28, 1982	Lorraine Jean Wilson (Mrs.)

ADDRESS

4833 BOYD DRIVE CARMICHAEL CA. 95608

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1978 **21-4138**

EXISTING STOCKS OF VA FORM 21-4138, JUL 1977, WILL BE USED.

EXHIBIT I

Regional Offi[illegible]

211 Main Street
San Francisco, CA 94108

Veterans Administration

May 5, 1982

Mrs. Doris J. Wilson
4833 Boyd Drive
Carmichael, CA 95608

Dear Mrs. Wilson:

With respect to your request for a hearing, we have selected a tentative date and time of Wednesday, June 2, 1982, at 1:30 p.m. Hearings are conducted at this address on the 12th floor, Hearing Room A. Personal expenses incidental to hearings must be met by appellants.

In a few days we will contact you to confirm the hearing date. In the meantime, you should consider several points regarding hearings. Our hearings are nonadversary. That means that they are informal and serve the purpose of receiving testimony pertinent to the issue. We do not contend with appellants by arguing our point of view and we do not conduct cross-examinations. See the attached form for more information on the nature of hearings.

There are a few common misconceptions regarding hearings. For example, appellants assume that the hearing is a necessary step in the appeal process. This is not true. You may proceed with an appeal to the Board of Veterans Appeals, Washington, D. C., even though no hearing transpired. Also, appellants assume that the hearing is conducted by persons at a higher administrative level than those who made the original decision. Actually, the hearing is conducted by persons in the same positions as those who made the decision.

We offer these observations to enable you to make an informed decision on the question of proceeding with the hearing. You may wish to contact your service representative, Veterans of Foreign Wars, Room 1209, for further information, or you may hold your questions in anticipation of our contact. Of course, you may decide at any point that your evidence can be presented equally well in writing. If you so decide, please use the enclosed statement(s) in support of claim.

In Reply Refer To: 343/21 XC-14 992 808

EXHIBIT J

2.

XC-14 992 808

Mrs. Doris J. Wilson

Also, you requested a 90-day extension. The 60-days mentioned in our February 22 letter is for administrative purposes. You actually have until January 21, 1983, to complete your appeal. You may present your evidence at your hearing or as soon after it as you can.

Sincerely yours,

T. A. Verrill

T. A. VERRILL
Adjudication Officer

Enclosures:
VA Form 21-4138
VA Form 1-4297

cc:
Veterans of Foreign Wars

VETERANS ADMINISTRATION

Fed Bldg., Fort Snelling
St. Paul MN 55111

74

May 19, 1981

IN REPLY REFER TO 21 24

FILE NUMBER

Your claim for death benefits is disallowed.

The evidence does not establish that the veteran's death was due to a service-connected disability.

THANK YOU.
VETERANS ADMINISTRATION

IMPORTANT—SEE REVERSE FOR PROCEDURAL AND APPELLATE RIGHTS
KEEP THIS LETTER FOR FUTURE REFERENCE

EXHIBIT K

21-8332a-4

NOTICE OF PROCEDURAL AND APPELLATE RIGHTS

We have based our decision on the evidence of record in your case and the applicable law. This explains your procedural and appellate rights in connection with this decision.

REPRESENTATION. You may be represented, without charge, by an accredited representative of a veterans organization or other service organization recognized by the Administrator of Veterans Affairs, or you may employ an attorney to assist you with your claim. Typical examples of counsel who may be available include attorneys in private practice or legal aid services. The services of a recognized attorney are subject to a maximum fee limitation of $10, set forth in 38 U.S.C. 3404(c) If you desire representation, let us know and we will send you the necessary forms. If you have already designated a representative, no further action on your part is required.

NEW EVIDENCE. You may submit additional evidence to strengthen your claim. It is in your interest to send us any new evidence as promptly as possible. We will carefully consider it and let you know whether it changes our decision.

PERSONAL HEARING. If you desire a personal hearing to present evidence or argument on any point of importance in your claim, notify this office and we will arrange a time and place for the hearing. You may bring witnesses if you desire and their testimony will be entered in record. The VA will furnish the hearing room, provide hearing officials, and prepare the transcript of the proceedings. The VA cannot pay any other expenses of the hearing, since a personal hearing is not required.

APPEAL. You may appeal our decision to the Board of Veterans Appeals at any time within one year from the date of this letter if you believe the decision is not in accord with the law and the facts now of record. You can start the appeal process by filing a Notice of Disagreement, You may do this by writing a letter to this office stating that you wish to appeal. If more than one benefit is involved, you should identify the benefit or benefits for which you are appealing. If you decide to appeal, we will advise you further as to your procedural rights as your claim progresses through the several stages of the appeal process.

MEMORANDUM DECISION AND ORDER
(CAPTION OMITTED)

I. INTRODUCTION

Plaintiffs challenge the constitutionality of 38 U.S.C. §§ 3404-3405, which impose a flat $10.00 fee limit for all work performed by an attorney in representing a veteran pursuing a claim before the Veterans Administration ("VA") for service-connected death and disability compensation. Plaintiff National Association of Radiation Survivors ("NARS") is an organization of veterans whose purpose is to obtain health care, compensation, and other benefits for its members and their families. Its members are veterans who participated in atomic bomb tests. Many of its members have pending Service-Connected Death and Disability Claims ("SCDDC"), 38 U.S.C. § 301 *et. seq.*, before the VA. Plaintiff Swords to Plowshares Veterans Rights Organization ("Swords to Plowshares") is a veterans organization emphasizing Vietnam veterans. Some of its staff and many of its clients are recipients or applicants for SCDDC benefits.

In addition to the organizational plaintiffs, there are several individual plaintiffs. Plaintiff Don Cordray allegedly contracted cancer and other ailments from exposure to radiation during atomic testing while on duty in the Navy, but was denied compensation by the VA. He alleges that he wanted to retain an attorney to represent him in his claim before the VA, but was prevented by the $10.00 fee limitation. Plaintiff Maxwell alleges that as a prisoner of war during World War II he was exposed to radiation from the Hiroshima and Nagasaki bombs, causing him to contract cancer and other disorders and causing four of his five babies to die of rare congenital abnormalities. His claims for radiation-related ailments were denied. He contacted an attorney to represent him but the attorney declined because of the $10.00 fee limitation. Plaintiff Warehime was part of a clean-up detail to Nagasaki and present at an atomic test which he alleges caused a variety of ailments. When he was downrated from a 100% to a 60% percent disability rating

by the VA,[1] he contacted several attorneys to challenge his downrating, but was unable to obtain representation because of the $10.00 limit.

Plaintiff Doris Wilson is the widow of a veteran whose ship was allegedly contaminated by radiation and who subsequently died of cancer. Ms. Wilson attempted to hire an attorney to represent her in her husband's claim for SCDDC but failed due to the $10.00 limit. The claim was denied.

Defendants are the VA, its Administrator, Walters, and its San Franciso Regional Director, Ising.

Plaintiffs challenge the $10.00 fee limitation embodied in §§ 3404-3405 as a deprivation of their right to procedural due process under the Fifth Amendment to the United States Constitution and their rights to petition and to speak and associate freely under the First Amendment. Section 3404 limits fees for attorneys and claims agents to $10.00 per successful claim:

> (c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—
>
> (1) shall be determined and paid as prescribed by the Administrator;
>
> (2) shall not exceed $10 with respect to any one claim; and
>
> (3) shall be deducted from monetary benefits claimed and allowed.

Section 3405 provides that any fee charged other than the $10.00 fee provided for successful claims in § 3404 subjects attorneys to a $500.00 fine or two years in prison:

> Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, ... shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

[1] The VA rates disability on a percentage scale of partial to total disability, in contrast to Social Security Disability which makes no provision for partial disability.

Plaintiffs allege that the $10.00 limit effectively deprives them of the ability to obtain counsel to represent them before the VA, because attorneys refuse to work for such a low fee and free legal assistance is not available in sufficient quantity. They further allege that a variety of factors combine to make the ability to retain counsel essential to a fair hearing on their disability claims, consistent with their right to due process. They allege that the recent emergence of new types of claims such as the individual plaintiffs' claim of radiation-caused illnesses, as well as claims of illnesses caused by exposure to the toxic chemical defoliant known as "Agent Orange" and Post Traumatic Stress Syndrome, has introduced new and greater complexity into the proof required. Therefore, they argue, legal representation is necessary for proper investigation and presentation of VA claims. They further allege that VA proceedings, while putatively non-adversarial, are in fact adversarial in nature, and that VA staff do not assist claimants in developing their claims. To the contrary, plaintiffs charge that VA staff encourage claimants to waive procedural rights. They allege that VA procedures are labyrinthine, frequently contained only in unpublished form, and difficult for the unitiated veteran to penetrate. They also charge that the statutorily permissible free representation provided by lay service organizations, such as the American Legion and The Veterans of Foreign Wars, 38 U.S.C. 3402, is inadequate due to insufficient resources and training to handle complex claims. In addition, plaintiffs allege that many veterans are poor and must depend totally or primarily on SCDDC for their support. Finally, they point to the lack of judicial review of VA claims decisions. 38 U.S.C. § 211(a). These circumstances, they argue, combine to make the option of representation by counsel a requirement of due process. In addition, plaintiffs claim that the effective ban on their ability to retain counsel deprives them of their First Amendment rights to petition the government for redress of grievances and to speak and associate freely

for purposes of obtaining compensation for their service-connected illnesses and deaths.

Defendants move to dismiss plaintiffs' procedural due process claim on the ground that the Supreme Court has already upheld the constitutionality of the fee limitation, most recently in its summary affirmance of *Genaron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975), *aff'd per curiam sub nom. Gendron* v. *Levi*, 423 U.S. 802 (1976). Defendants also move to dismiss the First Amendment claim on the grounds that plaintiffs' rights to petition, speech, and association and to meaningful access to the VA do not include the right to representation by an attorney.

Defendants rely primarily on legal argument, although they do introduce a few factual claims into their motion papers. Plaintiffs respond by treating defendants' motion as one for summary judgment and submit extensive exhibits in addition to their legal argument. The court concludes, however, that this motion is properly resolved on legal grounds alone, and that consideration of factual support for plaintiffs' allegations is premature. Accordingly, the court has not considered the factual material presented by either party, treating this motion as one to dismiss. The court has assumed all factual allegations in the complaint to be true and considered only whether plaintiffs have stated a claim.

Having reviewed the papers and heard the arguments of counsel, the court concludes that the motion to dismiss must be denied.

II. PLAINTIFFS' CLAIM THAT THE $10.00 FEE LIMITATION VIOLATES THEIR RIGHT TO PROCEDURAL DUE PROCESS

Plaintiffs base their due process claim on the landmark case of *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and its progeny. *Goldberg* held that welfare recipients have a property interest in welfare benefits and therefore are entitled to certain procedural protections before termination of their benefits. The Court rejected the rights/privileges distinction, holding that statutory entitlement to benefits establishes a property interest. *Id.* at 262. The Court held that due process requires that welfare recipients receive a pretermination hearing with notice and an opportunity to

be heard and to cross-examine witnesses and, most importantly for this case, the right to be represented by retained counsel. The Court observed:

> "*The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.*" *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing.

397 U.S. at 270-71 (emphasis added).

Subsequent Supreme Court decisions have made clear that analysis of procedural due process claims proceeds in two stages. First, the court must decide whether plaintiff has a liberty or property interest in the benefits sought which is protected under the Due Process Clause. Second, if plaintiff has the requisite liberty or property interest, the court must then decide what process is due. *See, e.g.*, *Mathews* v. *Eldridge*, 424 U.S. 319, 332-35 (1976); *Devine* v. *Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980). The test for determining what process is due is a flexible balancing test that takes into account all the particular facts and circumstances:

> "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 895 [81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230] (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 [92 S.Ct. 2593, 2600, 33 L.Ed.2d 484] (1972).... [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of addi-

> tional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. See, e.g., *Goldberg* v. *Kelly*, *supra*, 397 U.S., at 263-271 [90 S.Ct. at 1018-1022].

424 U.S. at 334-35.

Although the Supreme Court has never expressly held that applicants for government benefits, as distinct from recipients threatened with termination, have a property interest in those benefits protected under the Due Process Clause, the Ninth Circuit and many other lower courts have so held. *See, e.g., Ressler* v. *Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for subsidized housing have a property interest because applicants are members of the class the subsidy was intended to benefit and their eligibility is determined under standards that limit the decision-maker's discretion); *Griffeth* v. *Detrich*, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied sub nom. Peer* v. *Griffeth*, 445 U.S. 970 (1980) (applicants for general relief have property interest because authorizing statute and implementing regulations create "a legitimate claim of entitlement and expectancy of benefits in persons who claim to meet the eligibility requirements," *id.* at 121, and benefits are not discretionary); *Kelly* v. *Railway Retirement Board*, 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity under Railway Retirement Act had property interest; due process attaches to determination of eligibility at both application and termination stages); *Wright* v. *Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (applicants initially denied social security benefits, like those facing terminations, may be entitled to due process); *Davis* v. *United States*, 415 F. Supp. 1086, 1090-92, 1095-96 (D. Kan. 1976) (applicant for compensation for injuries incurred while engaged in prison employment has property interest in compensation for injuries which may severely restrict or eliminate his earnings capacity); *Shaw* v. *Weinberger*, 395 F. Supp. 268, 270-71 (W.D.N.C. 1975) (Supplemental Security Income applicant has property interest); *Barnett* v. *Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (welfare applicant has property interest); *see Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) (applicant for admission to practice law entitled to due process).

These courts reasoned that applicants, just like recipients threatened with termination for alleged ineligibility, have a property interest because of their statutory entitlement to benefits if they meet the substantive requirements. For example, the court in *Davis* v. *United States*, 415 F. Supp. 1086, provided a careful analysis of the property interest of an applicant for compensation benefits for injuries allegedly suffered while employed in a federal prison hospital:

> ['T]he applicant's interest consists of a claim authorized by statute and regulations to secure compensation for alleged *employment disabilities of prison origin that may severely restrict, and sometimes eradicate, his earning potential upon release into society*. Although at the application stage of the proceedings neither plaintiff nor a claimant in his position has yet been administratively adjudged entitled to receive benefits under the regulatory scheme, *an applicant nonetheless possesses a property interest of sufficient magnitude to invoke the protection of the Fifth Amendment's due process clause*. Like the welfare plaintiffs in *Goldberg* v. *Kelly*, 397 U.S. 254 [90 S.Ct. 1011, 25 L.Ed.2d 287 (1970)], inmates have been granted an *entitlement to compensation benefits* under 18 U.S.C. § 4126 and its attendant regulations if they factually satisfy the criteria set forth by the regulations. By their establishment of an objective medical standard for qualification, the regulations create a *legitimate expectancy* that an individual application will not be denied *unless the Bureau factually determines either that the claimant does not suffer from a disability originating from his prison employment, or from one that would affect his work capacity after release*.... This property interest is one of substantial importance to the plaintiff, *as its arbitrary denial could leave him with an uncompensated disability of lifelong duration and condemn him to "suffer grievous loss."*

Id. at 1090-91 (emphasis added). The analysis of these cases establishing a property interest in applicants for benefits applies equally in this case.

That interpretation is consistent with the Supreme Court's analysis of *Goldberg* in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (19772):

> the welfare recipients in *Goldberg* v. *Kelly*, *supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

As the Davis court observed:

> This statement demonstrates that the focal point of *Goldberg* was not upon the fact that benefits have previously been received, but upon the existence of statutory provisions creating the right to welfare and defining the terms under which it could be obtained.

Davis v. *United States*, 415 F. Supp. at 1092. It is true that a property interest in a benefit must be grounded in "a legitimate claim of entitlement" which is "more than an abstract need or desire for it" or "a unilateral expectation of it." *Roth*, 408 U.S. at 577. However, the plaintiffs here have the requisite legitimate claim of entitlement by virtue of the statutory entitlement to veterans benefits and their successful completion of military service. If they meet the requirements for service-connected death and disability, they are entitled to benefits. This is in sharp contrast to the plaintiff in *Roth*, who had no right to renewal of his teaching position under state law or past practice even if he performed satisfactorily. *Id.* at 567.

Defendants argue that *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), limited *Goldberg* by adopting the view that substantive statutory entitlements are limited by the accompanying procedural mechanisms for their implementation. That was the view of three judges, at least as to federal government employees terminable at will. Six judges rejected that position, however, holding that such employees

had a substantive property interest separate from the procedural mechanism for termination.

The second stage of the analysis, determining whether the $10.00 limit on attorneys' fees accords with due process, requires a careful inquiry into all the relevant circumstances to determine what process is due in the particular situation. *See Mathews* v. *Eldridge*, 424 U.S. at 334. The court must weigh the interests of the plaintiff veterans in obtaining service-connected death and disability benefits, the risk of erroneous deprivation created by the $10.00 fee limit, the probable value, if any, of increased access to retained counsel, and the government's interest in maintaining the limit. 424 U.S. at 335. Plaintiffs have alleged sufficient facts showing that the balance tips against the $10.00 limit to survive a motion to dismiss.

The veterans' interest in compensation, which in some instances may be less than that of welfare applicants for whom welfare benefits represent the last recourse against brutal need, appears to be as great or greater than that of others held entitled to procedural protections, such as applicants for subsidized housing, *Ressler* v. *Pierce*, 692 F.2d 1212 (9th Cir. 1982), and veterans receiving educational benefits, *Devine* v. *Cleland*, 616 F.2d 1080 (9th Cir. 1980). For example, plaintiffs allege that the individual plaintiffs and many members of the organizational plaintiffs must rely totally or primarily on Death and Disability Compensation for this support and the necessities of life. The fact that plaintiffs are applicants for new or additional benefits and not facing termination of existing benefits may somewhat reduce that weight of their interest, but does not eliminate it. *Ressler* at 1217. Their interest remains very substantial. Veterans killed or injured due to military service have lost all or much of their ability to earn a livelihood. For the veteran who has contracted an illness, "arbibrary denial [of benefits] could leave him with an uncompensated disability of lifelong duration and condemn him to 'suffer grievous loss.'" *Davis* v. *United States*, 415 F. Supp. at 1091. Veterans cannot sue for disabilities stemming from their military service under the Federal Torts Claims Act; compensation from the VA is their sole remedy against the

government. *Feres* v. *United States*, 340 U.S. 135 (1950). Moreover, the poverty and despair a veteran and his family may suffer from an uncompensated disability could frustrate the veteran's reintegration into civilian society. In addition, the court must weigh the psychological value to the veteran of being represented before the VA by the representative of his own free choice, including retained counsel, unhampered by any fee limit. *Cf. Devine* v. *Cleland*, 616 F.2d at 1088 (court "cannot ignore an important concern: the psychological value to the veteran of personally communicating with bureaucracy before it profoundly alters his entitled status").

Assessment of the "fairnes and reliability of the existing ... procedure, and the probable value, if any," *Mathews*, 424 U.S. at 343, of removing the $10.00 limit, will also require full development of the facts. Plaintiffs contend that the $10.00 limit effectively precludes almost all veterans from obtaining counsel. They argue that the complexity of their claims, for example, proof of "service-connected" causation of disabilities due to radiation which have a long latency period, renders the right to choose to be represented by an attorney unhampered by the fee limitation particularly essential. They further contend that VA proceedings are adversarial and complex and that representation by service organizations is inadequate. Indeed, the government admits that veterans may at times be precluded by the fee limit from obtaining counsel even though counsel would be of significant assistance. (Brief in Support of Motion to Dismiss 10 n.3) Moreover, VA decisions are immune from judicial review. 38 U.S. § 211(a). As the Ninth Circuit observed in the context of pretermination procedures for veterans' educational benefits, the lack of judicial review in VA proceedings contrasts with the availability of judicial review under the Social Security Act and makes it "especially crucial that the VA's ... procedures guarantee the degree of accuracy and fairness we expect of governmental processes." *Devine*, 616 F.2d at 1088.

Finally, the court must consider the governmental interest in retaining the $10.00 fee limit, and the additional expenditure and administrative burden, if any, that the government would incur if it were eliminated. The government has thus far advanced only one justification: protecting veterans from depletion of the amount of benefits awarded. (Brief in Support of Motion to Dismiss at 9:17-18) In the past it has been stated that the fee limitation served a dual purpose: protecting veterans from excessive fees and the government from fraudulent claims. *Calhoun* v. *Massie*, 253 U.S. 170, 173 (1920).

Plaintiffs argue that the original purposes of the fee limit no longer apply. The statutory fee limitation has existed in some form since 1862.[2] Originally, the fee limitations applied to the essentially clerical task of preparing claims forms. 13 Stat. 387 (1864) Later statutes distinguished between those essentially clerical functions for which a low flat fee limitation was maintained, and fees for litigated cases for which a percentage fee ranging from five to ten percent was authorized. 38 Stat. 711 (1914), 40 Stat. 102 (1917). (Apparently veterans previously had access to the courts in claims disputes.) Thus, the court in *Smith* v. *United States*, 83 F.2d 631, 640 (8th Cir. 1936), commented on the purpose of the flat fee limitation: "[t]he evident purpose of Congress was to protect veterans from extortionate fees for mere clerical assistance essential to the preparation and execution of the papers necessary to the presentation of their claims to the Veterans Administration."

The government clearly has no direct financial interest in the $10.00 fee limitation, since the veterans seek only the right to *retain* counsel at their own expense, not to have the government foot the bill. Of course, if removal of the fee limit resulted in more successful claims due to more effective representation, government expenditures on veterans' claims would increase. However, denial of valid claims because of inadequate representation is not a legitimate

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[2] In an act passed on July 15, 1862, Congress provided that payments to attorneys assisting in the procurement of pension or bounty claims would be limited to $5.00, with additional small payments available under special circumstances. 12 Stat. 566 (1862). A subsequent series of statutes was passed amending this provision, and enacting similar provisions with respect to various groups. *E.g.*, 43 Stat. 628 (1924); 49 Stat. 2031 (1936).

government interest which this court may take into account in the due process calculus.

The government asserts only a paternalistic interest in protecting veterans from sharing their benefits with attorneys. This paternalistic interest in the fee limitation may not outweight the veterans' interest in representation by counsel, particularly where First Amendment rights are also implicated, as discussed below. *Cf. In re Gault*, 387 U.S. 1, 35-37 (1966) (juvenile charged with delinquency has right to counsel and other procedural protections despite government's argument that juvenile proceedings are non-adversarial and safeguard the juvenile's best interest.) Moreover, the government's paternalism seems particularly misplaced here, where plaintiffs' claims have been denied. Plaintiffs obviously believe that their own best interests would be served by having the choice of securing legal representation which would increase their chance of success and sharing the proceeds, rather than ending up with nothing at all. Plaintiffs may be able to show that protection of veterans against unscrupulous attorneys by the drastic means of limiting fees to so low a sum as to eliminate legal representation altogether is no longer necessary. For example, they may show that abuse by attorneys is less prevalent now than it once was, and that the public is more sophisticated in dealing with attorneys. Veterans, of course, are adults generally presumed capable of making their own decisions. Further, plaintiffs may well be able to show that the claims process extends far beyond mere clerical work. Finally, it may be that less drastic measures, such as a reasonable limit on contingency fee recoveries, would adequately protect the government's interest while permitting veterans the option of representation by retained counsel.

Defendants argue that this court may not consider plaintiffs' due process claim because the statutory fee limitation has already been definitively upheld against due process challenges. Denfedants cite the following cases: *Calhoun* v. *Massie*, 253 U.S. 170 (1920); *Margolin* v. *United States*, 269 U.S. 93 (1925); *Hines* v. *Lowrey*, 305 U.S. 85 (1938); *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D. Cal. 1975),

aff'd per curiam sub nom. Gendron v. *Levi*, 423 U.S. 802 (1976); *Hoffmaster* v. *Veterans Administration*, 444 F.2d 192 (3d Cir. 1971) (per curiam); *Staub* v. *Roudebush*, 424 F. Supp. 1346 (D.D.C. 1976), *vacated sub nom. Staub* v. *Johnson*, 574 F.2d 637 (D.C. Cir. 1978); and *Holley* v. *United States*, 352 F. Supp. 175 (S.D. Ohio 1971). The older Supreme Court cases, *Calhoun*, *Margolin* and *Hines*, are distinguishable; they were challenges by attorneys, not veterans as here, who attempted to collect more than the statutory fee and the decisions were based on a substantive rather than procedural due process theory. *See Gendron*, 501 F.2d 1087, 1088 (9th Cir. 1974). *Hoffmaster* and *Holley* simply relied on those earlier cases without recognizing this distinction. Finally, defendants fail to realize that the district court opinion in *Staub* upholding the statute was vacated and hence has no precedential value in this court.

Gendron did involve a veteran's challenge of the $10.00 fee limitation on procedural due process and equal protection grounds. As in this case, the veteran charged that the $10.00 limit precluded him from retaining an attorney. However, unlike this case, where plaintiffs have undertaken extensive discovery and made detailed factual allegations which they intend to prove, *Gendron* was tried on a meager set of stipulated facts without any proof that service organization representation was inadequate or that the veteran's claim was particularly complex. The district court in *Gendron* initially dismissed for want of a substantial federal question, and the Ninth Circuit reversed and remanded with instructions to convene a three-judge court. 501 F.2d 1087. The district court then upheld the constitutionality of the $10.00 fee. It reasoned that an applicant for benefits, unlike a recipient threatened with termination, has no property interest in benefits. Accordingly, the court never reached the second stage of procedural due process analysis of determining what process was due. The court also rejected the equal protection challenge on the grounds that veterans' benefits were different from other benefit programs lacking the $10.00 limit.

On appeal to the Supreme Court, the jurisdictional statement presented the following questions:

(1) Does an applicant have a property interest in disability benefits?

(2) Does § 3404 deprive veterans of property without due process of law?

(3) Does § 3404 deprive veterans of liberty without due process of law?

(4) Does § 3404 deprive veterans of equal protection?

(5) Did the district court improperly refuse to receive evidence of the inadequacy of representation by service organizations and their lay personnel offered by appellant at the trial of his action?[3]

The Supreme Court summarily affirmed. 423 U.S. 802 (1975).

This court must carefully examine the scope of the Supreme Court's ruling in *Gendron* to determine whether it

[3] The exact questions presented were:

1. Is there a deprivation of property within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States when the Veterans Administration denies a disabled veteran's claim for disability benefits under 38 U.S.C. §§ 310-13?

2. Does 38 U.S.C. § 3404, which limits to $10.00 the fee a retained attorney may receive for consulting with a veteran, or for preparing, presenting, and prosecuting the claim of a veteran seeking disability benefits under laws administered by the Veterans Administration, deprive veterans of property without due process of law, because a veteran is entitled to the procedural protection of retained counsel in unreviewable proceedings before the Veterans Administration?

3. Does 38 U.S.C. § 3404, as described above, deprive veterans of liberty without due process of law because the $10.00 fee limitation arbitrarily and capriciously prevents a veteran from availing himself of a statutorily granted right to retain counsel?

4. Does 38 U.S.C. § 3404, as described above, deprive veterans of equal protection of the laws as guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States, because applicants for benefits before other agencies of the United States Government are not similarly prevented by fee limitations from retaining counsel to assist them?

5. Did the District Court improperly refuse to receive evidence offered by appellant at the trial of his action, which evidence would have tended to prove that private veterans' organizations and their lay persons do not provide adequate representation at hearings of the Board of Veterans Appeals to review denials of applications for "service-connected" disability benefits?

precludes plaintiffs' procedural due process challenge in this case. It is clear that summary affirmances are binding on this court, *Hicks* v. *Miranda*, 422 U.S. 332, 344-45 (1975), although they have considerably less precedential value than opinions on the merits, *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 180-83 (1979). In applying summary affirmances as precedents, the district court must decide the difficult threshold question of whether the issues were properly presented to the Supreme Court and declared by the Court to lack merit. *Hicks*, 422 U.S. at 345 n.14. As the Court has recognized: "[a]scertaining the reach and content of summary actions may itself present issues of real substance." *Id.*

It is clear that when the Court summarily affirms, it adopts the judgment but not necessarily the reasoning of the court below. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). Thus, summary affirmances only reject those specific challenges in the jurisdictional statement which the Supreme Court necessarily denied. 432 U.S. at 176-77. For example, in *Torres* v. *New York State Department of Labor*, 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd* 405 U.S. 949 (1972), the district court rejected a statutory and procedural due process challenge to New York's "seated interview" procedure for terminating unemployment benefits, and the Supreme Court summarily affirmed. Subsequently, an identical challenge was mounted against Connecticut's procedure, which also consisted of a seated interview concerning termination and suspension of benefits pending administrative appeal. *Steinberg* v. *Fusari*, 364 F. Supp. 922 (D. Conn. 1973), *vacated and remanded*, 419 U.S. 379 (1974). The district court in *Fusari* considered itself bound by the *Torres* summary affirmance on the question whether Connecticut complied with the statutory requirement of payment of benefits "when due." However, the court distinguished the constitutional issue on the grounds of Connecticut's greater delay in resolving administrative appeals than in New York and the failure of the *Torres* court to consider the probable accuracy of the challenged procedures. 419 U.S. at 388 n.15. The Supreme Court held that *Torres* did not bar consideration of the statutory issue be-

cause "many of the factual distinctions that the District Court relied on to distinguish *Torres* on the constitutional issue apply equally to the 'when due' question. *Id.* It observed that "[a]ny statutory requirement that embodies notions of timeliness, accuracy, and administrative feasibility inevitably will generate fact specific applications." *Id.* The Court therefore did not need to reach the constitutional question, and remanded as to the statutory question because Connecticut had amended its procedures in the interim. But the Court apparently endorsed the district court's distinction of the summary affirmance in *Torres* on the constitutional issue based on the highly particularized inquiry necessary for due process analysis, and clearly held that the district court should also not have considered itself bound on the statutory issue.

Having carefully considered the decision in *Gendron*, this court concludes that *Gendron* may only have affirmed the judgment of constitutionality as applied to the individual plaintiff there and thus does not bar plaintiffs' challenge here to the fee limitation as applied to them. The summary affirmance is binding only as to the issues properly presented and necessarily decided. The Supreme Court may not have adopted the district court's reasoning that veterans lack a property interest in disability benefits. It may only have decided that the individual plaintiff in *Gendron* had a property interest but that under the circumstances he received due process, without deciding the constitutionality of the fee limitation as applied to different plaintiffs under different circumstances. Analysis of procedural due process claims must be sensitive to the particular facts affecting the fairness of the proceeding. *See Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976); *Fusari*, 419 U.S. at 388 n.15. Important differences between the *Gendron* case and this one may lead to a different outcome in the due process balance. The record in *Gendron* was sparse; plaintiff made no showing that his inability to obtain representation by an attorney prejudiced his right to a fair hearing. Rather, the thrust of his attack was that the $10.00 fee restriction on his ability to retain counsel was a per se violation of his due process rights. By contrast, plaintiffs here have engaged in

extensive discovery to support their allegations of the special difficulties of proving their claims and the prejudicial effects of the $10.00 fee limitation on their ability to get a fair hearing. Unlike the plaintiff in *Gendron*, they allege and seek to prove that the lay representation provided by the service organizations is inadequate. Thus, while *Gendron* does bar a facial challenge to the statute as violative of due process in all its applications, it does not bar plaintiffs' challenge here that the statute as applied to them violates due process.

III. PLAINTIFFS' CLAIM THAT THE $10.00 FEE LIMITATION DENIES THEIR FIRST AMENDMENT RIGHTS TO PETITION AND FREEDOM OF SPEECH AND ASSOCIATION

As a separate cause of action plaintiffs also allege that the $10.00 fee limitation deprives them of their First Amendment rights to petition and to freedom of speech and freedom of association. They argue that the effective bar on legal representation deprives them of meaningful access to the VA in violation of their right to petition in that without the opportunity to retain counsel they cannot adequately assert their claims. They also claim violation of their rights to associate freely with each other, to employ counsel, and to associate freely and speak with attorneys to obtain legal advice and advocacy.

Plaintiffs' First Amendment theory is distinct from their due process claim. It has never been presented to the Supreme Court. It is clearly not barred by *Gendron*, since no First Amendment claim was raised in the district court or in the jurisdictional statement. *See Mandel* v. *Bradley*, 432 U.S. 173, 179-80 (1977) (Brennan, J., concurring).[4] Moreover, by contrast to the procedural due process claim, no property or liberty interest need be established as a prerequisite to asserting a First Amendment claim. *Cf. Hilliard* v. *Scully*, 537 F. Supp. 1084 (S.D.N.Y) (even

[4] Even if it could be argued that a First Amendment challenge was somehow implicit in *Gendron*, summary affirmances do not resolve questions which "merely lurk in the record." *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979) (citation omitted).

though prisoner had no liberty interest in being confined in any particular prison, his right to petition the courts could not be violated by transfer designed to obstruct his access to the courts).

The right to petition the government for redress of grievances is "among the most precious of liberties safeguarded by the Bill of Rights." *United Mine Workers of America, District 12* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). It has a long and distinguished lineage in constitutional law, dating back to the Supreme Court's recognition in *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1876), that the right to petition is inherent in our very form of government. The right to petition is closely interwoven with the other precious First Amendment rights of free speech and association. *United Mine Workers*, 389 U.S. at 222. These rights extend to vigorous advocacy, beyond "abstract discussion, unreleated to action. The First Amendment is a charter for government, not an institution for learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action not merely to describe facts." *Thomas*. v. *Collins*, 323 U.S. 516, 537 (1945).

The Supreme Court has never directly addressed the question presented here. However, its cases establish the principal that the rights to petition, speech and association include the right to retain attorneys without barriers from restrictive regulation where legal representation is necessary to effective access to governmental processes. In a series of cases, the Supreme Court established the "basic right to group legal action," holding that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 585 (1971) (discussing *NAACP* v. *Button*, 371 U.S. 415 (1963)); *Brotherhood of Railway Trainmen* v. *Virginia State Bar*, 377 U.S. 1 (1964); *United Mine Workers* v. *Illinois Bar*, 389 U.S. 217 (1967). In those cases, the Supreme Court held that the First Amendment rights to petition, association, and speech protect efforts by organizations to achieve effective legal representation for

their constituents against state restrictions on solicitation of clients and unauthorized practice of law.

NAACP v. *Button* struck down the application of state bans on improper solicitation to the NAACP's efforts to provide legal representation for persons seeking legal redress for infringment of their civil rights. The Court stressed that the First Amendment protects "vigorous advocacy," not just abstract speech. 371 U.S. at 429. Although recognizing the state's valid concern with unscrupulous practices by attorneys, the Court stated: "[b]road prophylactic rules in the area of free expression are suspect. . . .[The state cannot] under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 438-49 (citations omitted).

Subsequent Supreme Court decisions extended *Button*'s protection of legal representation as a form of political advocacy to legal representation to advance purely economic interests. In *Brotherhood of Railway Trainmen*, 377 U.S. 1, Virginia sought to enjoin the union from recommending lawyers to members with federal compensation claims for railway injuries, claiming that the union's activities constituted improper solicitation of legal business and the unauthorized practice of law. The Court held that the Union's efforts to secure effective legal representation for its members, although not a form of political expression like the NAACP's activities, were also protected by the First Amendment rights of petition, speech, and association. *Id.* at 7-8. Moreover, the Court made clear that just as the First Amendment would not tolerate a direct ban on access to the courts, it would not permit Virginia's indirect interference with the right to petition by erecting barriers to access to effective legal assistance. Viewing access to legal representation as integral to meaningful access to the courts, the Court stated: "[t]he right to petition the courts cannot be so handicapped." *Id.* at 7.

Similarly, in *United Mine Workers* v. *Illinois Bar*, 389 U.S. 217 (1967), the Court held that the union's employment of a salaried attorney to represent its members in workers' compensation litigation was protected by the rights of free speech, association, and petition. While the

litigation, as in *Trainmen*, was aimed solely at economic compensation for victims of industrial accidents, the Court reiterated that "the First Amendment does not protect speech and assembly only to the extent it can be characterized as political." Id. at 223. The Court reasoned that a ban on the Union's provision of legal counsel to its members substantially impaired the Union's First Amendment rights, yet was not necessary to protect the states' interest in legal ethics. Finally, in *United Transportation Union*, 401 U.S. 576, the Supreme Court held that the Union's efforts to protect workers suing for FELA damages from excessive fees by incompetent attorneys were protected by the First Amendment.

The lower courts have also recognized that limitations on representation by attorneys trench upon the right to meaningful access to the courts and the right to free speech. For example, *Martin* v. *Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (Wald, J.) held that restrictions on federal employees' communication to their attorneys of information exempt under the FOIA "implicates the fundamental right of those employees to meaningful access to the courts" as well as their right to speak with their attorneys and their right to effective assistance of counsel. The court stated: *"while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights." Id.* at 32 (footnote and citation omitted) (emphasis added). Similarly, prisoners have a right of meaningful access to the courts which encompasses all means necessary to a fair hearing, including access to legal assistance and information. *See, e.g., Bounds* v. *Smith*, 430 U.S. 817 (1977) (states must protect the right of prisoners to meaningful access to the courts by providing law libraries or alternative sources of legal information); *Gilmore* v. *Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger* v. *Gilmore*, 404 U.S. 15 (1971) (prison regulation severely limiting law books in prison libraries denied reasonable access to the courts, which "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary."

These cases establish that the First Amendment protects plaintiffs' right to retain legal counsel to represent them on their compensation claims free from unduly restrictive fee limitations if, as they allege, such representation is necessary for meaningful access to the VA. Indeed, the case is especially compelling here, because plaintiffs allege that the $10.00 fee limitation achieves indirectly what a direct ban on legal representation would achieve directly. By contrast, in the union and NAACP solicitation cases, the restrictions on solicitation and unauthorized practice of law did not choke off access to lawyers completely but left individuals free to retain lawyers without the aid of those organizations. The restriction attacked here is more drastic.

It is clear that the right to petition extends beyond ensuring meaningful access to the courts to the right of access to administrative agencies. As the Supreme Court stated in *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972), the right to petition is not limited to attempts to influence the legislature or executive:

> [t]he same philosophy governs the approach of *citizens or groups of them* to *administrative agencies* (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government .... The right of access to the courts is indeed but one aspect of the right to petition.

(emphasis added). *See Stern* v. *United States Gypsum, Inc.*, 547 F.2d 1329 (7th Cir. 1977), *cert. denied* 434 U.S. 975 (right to petition protects complaint about IRS agent's professional conduct to his superiors); *International Union UAW* v. *National Right to Work*, 433 F. Supp. 474 (D.D.C. 1977) (right to petition extends to NLRB as well as courts); *Center for United Labor Action* v. *Consolidated Edison Co.*, 376 F. Supp. 699, 701 (S.D.N.Y. 1974) (right to petition extends to all departments of government, including state administrative agencies). Thus, the right to petition extends to plaintiff's claims before the Veterans Administration. Indeed, the right to effective access to the VA is particularly valuable here, because the VA is the sole forum for veterans' compensation claims. There is no judicial

review of VA decisions on claims, 38 U.S.C. § 211(a), and veterans cannot sue the federal government under the Federal Torts Claims Act for injuries arising out of military service, *Feres* v. *United States*, 340 U.S. 135 (1950).

The position of organizational plaintiff Swords to Plowshares is directly akin to that of the unions in *United Transportation Union* v. *Michigan Bar*, 401 U.S. 576, 580, *Brotherhood of Railway Trainmen*, 377 U.S. 1, and *United Mine Workers*, 389 U.S. 217. Like the unions whose efforts to secure effective legal representation for their members were stymied by restrictive state regulation, Swords to Plowshares alleges that the $10.00 fee limitation effectively precludes it from providing adequate legal representation to the veterans it was organized to assist.

Moreover, the right to petition extends to individuals as well as groups, as the same passage in *California Motor Transport* makes clear by including within the right to petition "the approach of *citizens or groups of them* to administrative agencies...." *Id.* at 510 (emphasis added). Similarly, the Supreme Court in *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977), explained that the principle underlying the NAACP and union solicitation cases extends to individual efforts to obtain legal assistance:

> Underlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups.

Thus, the right to consult legal counsel applies to the organizational plaintiffs, the veterans organizations who seek to aid veterans with their compensation claims, and the individual veterans pressing their claims before the VA.

The $10.00 fee limitation implicates plaintiffs' First Amendment right to receive information and advice. As the Supreme Court has recognized, even purely commercial speech about the availability and price of legal services is protected by the First Amendment because "such speech serves individual and societal interests in assuring informed and reliable decisionmaking." *Bates* v. *State Bar of Arizona*, 433 U.S. at 364 (1977). Similarly, *Martin* v. *Lauer*, 686 F.2d at 33, stressed the important interest of individuals in receiving early assistance from attorneys in assessing their legal rights when it struck down limitations on attorney-client communication.

As discussed above, the cases make clear that the veterans' petitioning of the VA to obtain economic compensation does not lose its First Amendment protection because it is motivated primarily by economic self-interest. *See, e.g.*, *United Mine Workers*, 389 U.S. at 223; *California Motor Transport*, 404 U.S. at 510-11. The court notes, however, that compensation claims of veterans like the individual plaintiffs' and Vietnam veterans represented by the organizational plaintiffs implicate political values as well, because of their connection with public controversies over the safety of nuclear weapons and chemical defoliants and the psychological stress allegedly engendered by participation in the Vietnam War.

The fact that the statute does not bar representation by attorneys outright, but instead effectively achieves the same result indirectly, does not of course immunize the statute from First Amendment infirmity. As the Supreme Court ruled in *Brotherhood of Railway Trainmen*, the government cannot indirectly handicap access to the courts anymore than it can directly bar access. 377 U.S. at 7. Indeed, although it is difficult to conceive of a measure which would ban a business seeking a license from a regulatory agency or a government loan or indemnity payment being represented by an attorney paid more than $10.00, this is such a statute.

The fact that the limitation attacked here is an expenditure of funds for legal representation also does not take the statute outside the purview of the First Amendment. The Supreme Court has recognized that expenditure of funds for advocacy of political or economic interests is protected speech. *Buckley* v. *Valeo*, 424 U.S. 1, 35-59 (1976) (per curiam) (limits on campaign expenditures directly and substantially restrain speech); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Counsel, Inc.*, 425 U.S. 748, 761 (1976) ("speech does not lose its First Amendment protection because money is spent to protect

it"). Thus, the court in *International Union U.A.W.* v. *National Right to Work*, 433 F. Supp. at 481-83, held that a statutory ban on employer and employer association financing of lawsuits and administrative proceedings initiated by employees against unions violated the employers' right to petition.

Defendant argues that *Schweiker* v. *McClure*, 456 U.S. 188, 199 & n.14 (1982), establishes that representation by an attorney is not necessary to the exercise of plaintiffs' right to petition. However, *McClure* did not involve a restriction on claimants' ability to retain counsel to represent them in claims proceedings. Rather, in *McClure*, plaintiffs sought to require the government to provide at its expense lawyers to act as hearing officers in Medicare claims. The Supreme Court held only that due process did not require that Medicare hearing officers be attorneys. The claim here is completely different. Plaintiffs do not argue that the VA hearing officers must be attorneys, or even that the government appoint attorneys at government expense to represent veterans in claims proceedings. Plaintiffs only seek the right to hire counsel at their own expense.

Defendants also cite *Bush* v. *Lucas*, 103 S.Ct. 2404 (1983), and *Chappell* v. *Wallace*, 103 S.Ct. 2362 (1983). In *Bush*, the Court refused to allow a *Bivens* type of action, 403 U.S. 388 (1971), by military personnel against their superiors for civil rights violations. In *Chappell*, the Court refused to create a *Bivens* cause of action for federal employees to sue their supervisors directly under the First Amendment because of Congress' provision of elaborate, though less generous, civil service remedies. The court fails to see the relevance of these cases. Plaintiffs do not seek a judicial remedy for their death and disability claims, but only fair administrative proceedings.

Thus, plaintiffs have stated a First Amendment claim based on their allegations that the $10.00 fee limitation renders them unable effectively to petition the VA for death and disability benefits, and substantially impedes the individual plaintiffs' ability to associate and communicate with attorneys about their claims, and the organizational plaintiffs' ability to associate for the purpose of providing

legal representation to their clients. If plaintiffs are able to establish their allegations defendants, to save the statute from constitutional infirmity, will have to show, at a minimum, that the $10.00 fee limitation is necessary to achieve an important governmental interest unrelated to the suppression of First Amendment rights. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968). The government will face a difficult burden in justifying the $10.00 fee restriction on veterans' freedom to retain counsel, because "[b]road prophylactic rules in the area of free expression are suspect." *NAACP* v. *Button*, 371 U.S. 415, 438. Moreover defendants' asserted justification for the limitation—protection of veterans from improvident attorneys fees agreements—runs afoul of the First Amendment's hostility to restrictions on speech justified by paternalism. Thus, the Supreme Court rejected the "highly paternalistic approach" of banning advertising of prescription drugs to protect consumers against rash choices because the First Amendment assumes "that people will perceive their own best interests if only they are well enough informed and that the best means to that end is to open the channels of communication rather than close them." *Virginia State Board of Pharmacy*, 425 U.S. at 770; *see Bates*, 433 U.S. at 365.

IV. CONCLUSION

Plaintiffs have stated claims under the Due Process Clause of the Fifth Amendment and the First Amendment. Accordingly,

IT IS HEREBY ORDERED that defendants' motion to dismiss is DENIED.

Dated: October 21, 1983

/s/ _____

MARILYN HALL PATEL
United States District Judge

DECLARATION OF WALTER R. ATLEE
(CAPTION OMITTED)

I, WALTER R. ATLEE, do hereby declare and state as follows:

1. I am a veteran of the United States armed forces. I served in the United States Air Force from 1954 through 1957, when I was honorably retired for a service connected disability. I know the facts recited herein of my own knowledge and if called upon could competently testify thereto.

2. In June 1957 I began to receive veterans' disability compensation for my osteomylitis and related orthopedic condition. The V.A. determined in June of 1957 that I had a one-hundred percent rating for my service connected medical condition.

3. I am still receiving disability compensation for my osteomylitis and other orthopedic problems. In October 1982, however, the San Francisco Regional Office of the Veterans Administration reduced my disability rating from one hundred percent to seventy percent. This reduction was made retroactively to 1966. I did not receive any hearing before the reduction in my disability rating was made. I subsequently received a notice of my right to a hearing but knew a hearing would be futile without an attorney to represent me. Further, I had serious difficulty in finding an authorized Veterans' group that would represent me. The American Red Cross, which held my power of attorney, withdrew its representation without telling me why, just when I needed it most. I tried to battle the V.A. by letter, but all of my pleas were ignored. All of their arguments cite laws, regulations and rulings of which I am not aware.

4. The V.A. has commenced an action to recover the alleged overpayment that they claim I received between 1966 and 1982. The total amount that they are asking me to pay is in excess of $71,000. The V.A. is now attempting to cut off my compensation entirely in order to "recoup" the alleged overpayments. The V.A. also withheld all authorized disability compensation from me for a period of two months without explanation.

5. 38 U.S.C. § 110 specifically provides that a disability compensation rating in effect for 20 or more years cannot be reduced except upon a finding of fraud. Fraud is the sole criterion for reducing protected ratings. The V.A. has not found that I committed any fraud, yet they have reduced my disability rating retroactively all the way back to 1966. The V.A. claimed that it could establish "supplemental" reasons for reducing my compensation rating even though my rating had been in effect for 25 years. I argued that they took an action which was clearly prohibited by law.

6. The V.A. has denied me constitutional due process by preventing me from hiring an attorney to defend myself against the reduction of my compensation. The V.A. also ignored two separate legal opinions which they had requested—one from the United States Attorney in San Francisco and another from an Assistant U.S. Attorney General. Both cited the absence of fraud on my part and strongly criticized the V.A. Regional Office for serious administrative deficiencies in my case.

7. The V.A. knowingly withheld irrefutable evidence which could have demonstrated that I was not guilty of any fraudulent act. The V.A. claims that I never notified them that I was employed by the State of California. The V.A. possesses evidence, however, that I notified them of my employment in a timely manner. This evidence has been withheld because it demonstrates material fault by the V.A. and illustrates that I was not guilty of any fraudulent act.

8. Without my consent V.A. officials in San Francisco allowed confidential and privileged records protected by the rigid safeguards of the Privacy Act to be illegally disseminated to the press. The V.A. subsequently discussed facets of my claim with the press without my permission and implied wrongdoing on my part. The V.A. took no action to stop or dissuade the press from using confidential records taken from my V.A. files. Various articles regarding my claim were published widely in the press and each quoted a V.A. statement alleging wrongdoing on my part. Immediately after this highly negative press coverage, my employment with the State of California was terminated without

any explanation. The V.A. refused to request an investigation into the criminal theft of my records although I made such a request on two occasions.

9. The V.A. refused to investigate a probable criminal violation of law by the service officer at the San Francisco, California, Department of Veterans Affairs who held my power of attorney. A preliminary investigation indicated that he may have been involved in illegally releasing my records to the press, but the investigation was dropped.

10. In addition, the V.A. has refused to act upon, or investigate, my provable claim that the San Francisco Adjudication Officer was making biased, negative statements that were prejudicial to me. This employee supervises V.A. staff members who make recommendations or decisions regarding my disability claim.

11. The V.A. refused to weigh medical evidence submitted, in 1982, by my authorized representative in support of my claim. This medical evidence revealed continued nonunion of the right femur and the left ulna, loss of use of right leg, degenerative arthritis in both hips, calcific tendonitis in both shoulders and osteomylitis. All the foregoing demonstrate that my service-connected disability is growing more severe rather than improving.

12. The V.A. has forced me to seek redress from staff representatives who are biased against me and who have privately and officially accused me of fraud. Accordingly, the V.A. is forcing me to handle my complex legal problem with the help of only lay personnel while the V.A. has access to many attorneys who seem to be focused on rejecting any claims that I may make.

13. In short, the San Francisco Office of the V.A. has consistently taken a directly adversarial position in their contacts with me. The V.A. has engaged in harassing and punitive acts which I believe have grossly violated my statutory and constitutional rights. I am prevented, however, from hiring an attorney to represent me in these legal actions. The V.A. is asserting the dual prohibition that I cannot seek redress in the courts and cannot compensate an attorney in an amount over $10. Therefore, no attorney will represent me.

14. Without removal of the fee limitation, I will have no ability to obtain the assistance I desperately need to vindicate myself, reestablish my good name, and restore the disability benefits to which I am lawfully entitled. My entire family is damaged by my inability to defend myself from the illegal actions of the V.A. and this compounds the anguish that I am forced to experience.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 1983

/s/ _____

WALTER R. ATLEE

DECLARATION OF WALTER R. ATLEE
(CAPTION OMITTED)

Clarence William Autrey declares and states as follows:

1. I am a veteran of the United States Army and the United States Air Force, having served in the Army from 1954 to 1957 and in the Air Force from 1957 to 1967. I am 48 years old and am a resident of Empire, California. I am not a member of NARS or Swords to Plowshares. I know the facts stated in this Declaration from my own personal knowledge, and if called, could and would testify to them.

2. While in the Army, I was transported to Eniwitok in the South Pacific for a series of atomic bomb tests there. I was assigned to general duty at the NCO Club and witnessed approximately six atomic bomb explosions. No protective measures were taken to guard me against radiation exposure and we were not warned of the hazards involved. While at Eniwitok, I swam in the water frequently and occasionally rode in a patrol boat in the immediate vicinity of sites of the nuclear blasts.

3. While I was in the Air Force, I was assigned to duty as a military policeman guarding nuclear weapons facilities at Geiger Field in Spokane, Washington and at Manzano Air Base, New Mexico, which is near Sandia Laboratories and Kirkland Air Force Base.

4. In approximately 1968 or 1969 I had several lymph nodes which had mysteriously swelled removed from my right arm. They were surgically removed by a Dr. Kurita in Modesto. In more recent years, and for the first time in my life, I have suffered from lethargy, listlessness, depression, insomnia, and loss of appetite. For the last year or so, I have experienced deep pain in the area of my neck. In approximately June 1983, I was diagnosed at the V.A. Hospital in Livermore as having "hot" or growing nodules in my thyroid. The V.A. doctors are considering surgical removal, and I am scheduled for another examination in approximately six weeks. At about the same juncture, my teeth started to fall out, which Dr. Gulang at the V.A. Hospital in San Francisco attributed to my thyroid problem. Five of my teeth were extracted by Dr. Navarro at the San Francisco V.A. Hospital. I am informed that the latter

problems can be caused by exposure to radiation. In addition, over the past several years, I have been treated for unexplained growths on the soles of my feet, which are similar in appearance to large corns. They are extremely painful. None of the doctors I have visited have been able to figure out the cause of these growths. Finally, I was recently diagnosed by Dr. Yang, a V.A. cardiologist, as having a leaky heart valve. He has instructed me to avoid stressful situations.

5. In approximately 1977, I went to visit a veterans service officer at the local V.A. Office in Modesto to explore the possibility of filing a service-connected disability claim. I believe his name was Ira Wilson. He met with me for an extremely short time—less than ten minutes. He did not ask to see any of my medical or service records or inquire into my medical problems. When I asked him about filing a radiation claim, he simply indicated that I had no claim. I was disappointed, and merely dropped the matter.

6. Again in August or September 1983, I went to see a veterans service officer, this time at the V.A. Hospital in Livermore. I made an appointment, but became upset when we were constantly interrupted during our chat and the service representative did not appear interested or capable of helping me.

7. I am extremely poor and my sole source of income is disability payments of $605.00 a month which stem from a work-related accident that seriously injured my elbow. I am also blind in my right eye. I have been unable to work since 1979. No one will hire me because of my disabilities.

8. I am very scared about my physical condition. I am so bitter about what has happened to me that I find it difficult to even talk about it. My mental condition has deteriorated markedly over the last few years. I do not know how to go about filing or pursuing a V.A. claim. I would like to employ an attorney on a contingency fee basis to prepare and handle my V.A. claim, but have been unable to do so because of the $10.00 limitation on attorneys' fees. I firmly believe that the fee limitation is unfair and drastically interferes with my ability to obtain redress for my service-connected injuries.

I declare under penalty of perjury that the foregoing is true an [sic] correct. Executed on September 24, 1983 at Empire, California.

/s/ _____
CLARENCE WILLIAM AUTREY

AFFIDAVIT OF RONALD G. BAKAL
(CAPTION OMITTED)

I, RONALD BAKAL, first being duly sworn, do hereby declare and state as follows:

1. I am an attorney duly licensed to practice law in the state of California. I have been practicing for more than 12 years. I have specialized in litigation primarily in the personal injury field. For the last eight years I have worked vigorously in obtaining compensation for the victims of exposure to radiation. I was counsel to the people of Marshall Islands and helped them secure Congressional compensation for their damages. I have also represented numerous veterans and civilians in litigation under the Federal Torts Act. I was and still am counsel on *Broudy* v. *United States*, 661 F.2d 125 (9th Cir. 1981).

In 1977 I undertook to represent the widow of Major Charles Broudy in her claim against the Veterans Administration for in service death benefits claims. I have spent more than 500 hours representing her at no charge. I have spent enumerable hours trying to find records from the various agencies of the federal government. On four occasions her claims were rejected, including one in front of the National Appeals Board in Washington, D.C. That hearing took me at least two full weeks of preparation. I was shocked at the condition of the Veterans Administration file in Washington. It was disorganized and contained documents from other Veterans. The hearing officers were basically unkowledgeable about radiation-related diseases. It took me at least two months to get the Veterans Administration to allow me to represent my client. These cases are extremely complex and require knowledge of law, physics and medicine.

There is little chance for these Veterans to collect compensation from civil lawsuits due to Federal Immunity laws.

I have had over 1000 requests for me to represent Veterans in Veterans Administration proceedings, but because of the lack of economic considerations I have refused.

Many Veterans chose not to go forward because of not being able to hire counsel. I have found the post-service or-

ganizations aids unknowledgeable in the legal and scientific areas necessary for effective representation.

Attorneys have represented millions of individuals in California Worker's Compensation cases, which are similar in nature to Veterans Administration claims with few complaints, and the system has been deemed to be a fair one.

I know that the Veterans claims procedure is an adversary proceeding and in most areas are too difficult for lay people to deal with. The current $10.00 rule is unfair and it denies counsel to needy American citizens.

/s/ _____
RONALD G. BAKAL

DATED: 3/30/83

Suscribed and sworn before
me this 30th day of March,

/s/ _____
NOTARY PUBLIC

AFFIDAVIT OF MARY BALUSS
(CAPTION OMITTED)

Mary Baluss, being first duly sworn, does hereby declare and state as follows:

1. I am an attorney duly licensed to practice in the District of Columbia. I am a 1975 graduate of the National Law Center, George Washington University and have at all times since November 25, 1975 been a member in good standing of the Bar of the Court of Appeals for the District of Columbia. From September 1975 to the present, I have been associated with the law firm of Steptoe & Johnson Chartered, specializing in litigation. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. §§ 3404-3505 and the nature of plaintiffs' claims in this action.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereof.

3. Since 1975 I have actively involved myself in the *pro bono* representation of former members of the armed services in a variety of cases. Particularly relevant to the case at bar, in 1975 and 1976 I was counsel of record for Emanual R. Staub, a veteran who had repeatedly tried and failed to attain paid counsel to prosecute his claim for veterans benefits due to injuries received while serving in World War II. At the time that I began his representation, Mr. Staub had already been denied benefits. Although I do not have personal knowledge of the poor representation that Mr. Staub was given by representatives of the veterans organizations practicing before the Veterans Administration, I witnessed Mr. Staub sign the original of the attached Affidavit of Emanual R. Staub and of my own knowledge, state that it is a true and correct copy thereof and that the original was filed with the Clerk of the District Court for the District of Columbia in *Staub* v. *Johnson*, Civil Action No. 73-1640. In his affidavit, Mr. Staub details the inattention given by his "representatives" and his own confusion and inability to represent himself adequately. I have myself reviewed verified transcripts of Mr. Staub's hearings. In neither did his "representatives" make a sub-

stantive presentation, assist with Mr. Staub's presentation or take any active role in clarifying for Mr. Staub the questions being presented.

4. From my detailed review of Mr. Staub's record, the factual development made on his behalf was minimal. Mr. Staub's medical documentation, in particular, was incomplete. Moreover, Mr. Staub was poorly prepared to respond to questions from a board composed of a doctor and two lawyers. Under these circumstances, his "hearing" was a meaningless formality.

5. Also attached hereto is a true copy of the Affidavit of Harold J. Nussbaum, the original of which is also on file in the District Court for the District of Columbia. Mr. Nussbaum, now a lawyer in private practice, served for a time as a non-lawyer service organization representative. His affidavit states unequivcally [sic] the need for legal representation in Veterans Administration proceedings and describes the conflict of interest inherent in veterans' representation and assistance by the service organizations or by Veterans Administration employees.

6. Because of publicity given Mr. Staub's case, I was contacted over a very short period by as many as 30 former servicemen seeking assistance. All had made some efforts to represent themselves or had been "assisted" by service organization representatives. All believed they had been seriously disadvantaged by lack of legal counsel. Because of the fee limitation, I was unable to represent these individuals.

/s/ _____
MARY BALUSS

DISTRICT OF COLUMBIA) ss:

Subscribed and sworn to before me this 1st day of July 1983.

/s/ _____
NOTARY PUBLIC
My commission expires 9/14/87.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1640-73

EMANUEL STAUB, PLAINTIFF,

v.

RICHARD L. ROUDEBUSH, DEFENDANT.

AFFIDAVIT OF EMANUEL STAUB

Comes now the plaintiff, Emanuel Staub, and being duly sworn, states as follows:

1. I, Emanuel Staub, was a member of the United States Marines, on active duty from 1936 until 1947 and on reserve duty from 1954 through 1964. As a consequence of that service, I am entitled to applicable veterans benefits.

2. I suffer from a painful and disabling spinal condition which I believe to have been caused by a combat incident of World War II, and for many years have been unable to work long hours and, for long periods of time, unable to work at all. In 1968, I applied for disability payments under 38 U.S.C. § 310.

3. My application was turned down by the Philadelphia regional office of the Veterans Administration. At this prehearing stage I was "'counseled" by the Jewish War Veterans organization to the extent only that I was given help in filling out forms. Little or no substantive advice was offered. Following the determination that my disability was "not service connected," I obtained a hearing at the regional level. At the regional hearing, the Veterans Administration was represented by a panel consisting of a doctor, an attorney and an occupational specialist. I was questioned by these panel members as to the nature of my disability and my belief that it is service connected.

4. I was accompanied by a representative of the Jewish War Veterans to the hearing, but that person did not participate in the proceedings in any way other than to make a brief general statement to the board that I had a "good service record" and that he "hoped my application would be

considered." I was not counseled in advance of this hearing as to the most effective means of presenting my case or as to additional information which I might usefully present there.

5. The regional board reached no conclusion regarding the merits of my case and I was then automatically granted a hearing before the Board of Veterans Appeals in Washington, D.C. Although hearings before this board are the decisive and, in most cases, the final administrative proceeding within the Veterans Administration, I was given no advance counsel as to the nature of the proceedings or means by which I might best present my case. "Assistance" from the Jewish War Veterans counselor assigned to help me consisted entirely of a less than twenty minute interview immediately prior to the hearing, at which no matters substantive to my case were discussed. In fact, during much of that short period my counselor seemed primarily concerned with reading his mail.

6. When we arrived at the hearing, my counselor greeted the members of the panel as if they were old friends, and conversed with them about unrelated matters. When the hearing began, my counselor's sole role was to introduce me and, after my testimony, to tell the board that my record and case deserved consideration.

7. The Board of Veterans Appeals panel before which I appeared consisted of two attorneys, one of whom was the presiding member, and one doctor. As at the earlier hearing, I was questioned regarding my physical condition and the details of my claim that my disability is service connected. During the course of this questioning, I was at times confused by the seemingly irrelevant nature of some questions and by the nature of details sought.

8. After the hearing, I was notified that the Board of Veterans Appeals had denied my claim. I continued however to believe that the claim was well founded, and I discussed with others my feelings that my case had been poorly presented and not fully considered. One person, a law student, suggested that I contact a fellow student who had worked for the Veterans Administration. That student, after hearing my story, commented that I should have had

an attorney, and told me that "95% of the cases that are turned down could be won if the veterans had a lawyer." From him I also learned for the first time of the fee limitation in veterans' cases.

9. In the next few weeks I successively contacted seven attorneys in the Washington, D.C. area. Each refused to represent me. I believed that the fee restriction was an important aspect of these refusals. I further called an attorney in New York City who had recently received some publicity for representing servicemen in other types of cases; this person also refused to represent me.

10. I believe that denial of my claim by the Veterans Administration was due to the fact that I was unable to present my case properly and to articulate my claim. I do not feel that the presence of an advisor from the Jewish War Veterans in any way furthered my presentation beyond assistance with basic paperwork. Moreover, on expressing my concern after the Philadelphia hearing and suggesting that perhaps I should seek legal advice, the Jewish War Veterans representative discouraged such a move and told me that legal assistance would be no more effective than their help. I relied on this representation and believed incorrectly I would be actively represented in Washington. I do not know the training or background of the two "advisors" who accompanied me to my hearings, but I do know that they seemed unable to actively represent me during the hearings. Nor do I feel that I received the assistance I needed to organize my case and collect material for inclusion in the record.

/s/ _____
EMANUEL STAUB

DISTRICT OF COLUMBIA) SS:

I, SHIRLEY F. KOHN, a Notary Public of the District of Columbia, hereby certify that on July 8, 1976, Emanuel Staub appeared before me and being duly sworn, stated that the above Affidavit by him signed is true and correct to his knowledge, information and belief.

/s/ _____
NOTARY PUBLIC
MY COMMISSION EXPIRES SEPTEMBER 14, 1977

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1640-73

EMANUEL STAUB, PLAINTIFF,

v.

RICHARD L. ROUDEBUSH, DEFENDANT.

AFFIDAVIT OF HAROLD J. NUSSBAUM

Comes now Harold J. Nussbaum, and being duly sworn, states as follows:

1. I, Harold J. Nussbaum, am a member of the Bar of the District of Columbia. For many years I have represented individuals in numerous different types of legal proceedings involving various laws concerning veteran benefits. For example, I have represented many servicemen, veterans and their beneficiaries in court proceedings involving claims arising under insurance policies issued to servicemen and veterans. Additionally, I have also represented numerous widows and veterans in compensation and pension mandamus actions which, until the 1970 amendment of 38 U.S.C. § 211, could be brought before federal courts.

2. Of direct and immediate concern to the issues raised in the above-captioned proceeding, I am personally very familiar with proceedings before the Veteran's Administration, with the importance of legal representation at those proceedings, and with the practical prohibition of such representation, which has directly resulted from the $10 maximum on the fees that an attorney may collect for any representation before the Veteran's Administration. 38 U.S.C. § 3404.

3. From 1947 to 1953 I served as National Service Officer of the Disabled American Veterans in the Veteran's Administration's central office. In this capacity I presented literally thousands of cases for adjudication by the Veteran's Administration. During this period, in 1949, I began formal legal training at American University. While completing

my law school education I continued, from 1951-53, to present cases for adjudication before the Veteran's Administration while I continued to serve as National Service Officer of the Disabled American Veterans. The recoveries which I obtained on behalf of veterans dramatically increased *after* I received formal legal training. I believe that this success on behalf of the claimants that I represented is specifically attributable to the fact that as a lawyer I was a far more effective representative of veterans than a non-lawyer.

4. In 1953 I left the Disabled American Veterans and entered private practice. Since that time the $10 limitation placed on the fees an attorney may collect for representing a claimant before the Veteran's Administration has made it an economic impossibility for me to be directly involved in such representation except on an occasional basis.

5. Administrative hearings before the Veteran's Administration are based on a complex statutory and regulatory framework. By virtue of their legal training, attorneys are generally more able to understand and deal with the complexities of this framework than are those not trained in the law. There are many instances which vividly demonstrate the importance of being represented by an attorney before the Veteran's Administration. The familiarity of a lawyer with the difficult legal questions which often arise in proceedings before the Veteran's Administration is at times crucial to the veteran. For example, I have personally been involved with situations where a veteran has been charged with attempting to recover a fraudulent claim from the Veteran's Administration. Obviously such a charge raises significant legal questions involving all the elements of fraud, with which laymen are generally unfamiliar. Additionally, a finding of fraud could possibly result in referral of the matter to the U.S. Attorney and perhaps an indictment of the veteran.

6. Beyond the complexities of Veteran's Administration law and regulations, an attorney is by training equipped to deal with the administrative procedure itself and with the gathering and presentation of evidence which effectively links a veteran's personal situation to his legal entitlement.

In my experience an advocate's approach to such presentation is an important factor in successful representation.

7. Few veteran's organizations provide veterans with representatives who are legally trained or who are members of the bar. The limited training which these representatives have had, and the close relationship which those representatives maintain with the Veteran's Administration severely impair the effectiveness of their representation. Additionally, although employees of the Veteran's Administration may be contacted to "assist" a claimant, again such contact representatives are not attorneys and are not bound by the same loyalties and ethics that bind an attorney to his client. Indeed, those contact representatives are dependent upon their employer, the government, for their job efficiency ratings, thus further severely limiting the effectiveness of such representation.

/s/ _____
HAROLD J. NUSSBAUM

District of Columbia)ss:

On the 8th day of July, 1976, before me came Harold J. Nussbaum, to me known to be the individual described in and who executed the foregoing affidavit and acknowledged that he executed the same.

/s/ _____
(SEAL)

My commission expires: 3/15/77

DECLARATION OF JAMES L. BIANCHI
(CAPTION OMITTED)

I, JAMES L. BIANCHI, do hereby declare and state as follows:

1. I am an attorney duly licensed to practice law in the State of California. I commenced my civil practice as a sole practitioner in 1979, that maintains an emphasis in the areas of Administrative Law, Small Business Law, Military Law, and Veterans advocacy conducted pro bono. I am also experienced in Personal Injury, Wills, Trusts and Estate Planning. My experience with veterans advocacy commenced during my law school apprenticeship in 1974 during which I represented veterans at V.A. proceedings as a Certified Veterans Representative. The cases included a variety of matters related to establishing that a disability was service-connected, often resulting in hearings before the Board of Veterans Appeals. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. Secs. 3404-3505 and the nature of plaintiff's claims in this action.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

3. My most recent case involved the widow of a veteran who committed suicide. He suffered the classic symptoms of Delayed Stress Reaction after the War in Viet-Nam, and it clearly resulted in his suicide. His widow attempted to secure V.A. benefits for herself and their ten year old son, but would be denied on the basis that she could not prove that the suicide was service connected. The previous representation she received from the State funded Department of Veterans Affairs was competant [sic] in guiding her through the complex procedure, but was not able to provide effective representation in this type of unusual case. She had to prove that the suicide was connected to a mental disorder, and that the disorder was related to his service in Viet-Nam. The difficulty in doing so was compounded by the fact that Delayed Stress Reaction was not yet fully recognized by the V.A. as being a mental disorder related to

service. We prevailed, but only after spending numerous hours with medical/legal research, and covering general principles of Administrative Law not commonly known to the non-lawyer veterans representatives. Some Constitutional issues also had to be raised before the Board. Without the help of a lawyer, I am reasonably certain that she would of lost. Due to the $10 fee limitation, I elected to represent her without compensation. She resented that fact that she was not permitted to provide me with some compensation using the substantial retroactive payment she received as a result of my work.

4. I have experienced that the nature of claims being presented to the V.A. have become more complex and difficult to establish. Claims related to Delayed Stress, or Agent Orange present cumbersome problems in establishing the burden of proof required to show a service-connection. Veterans forced to represent themselves in these cases suffer extreme frustration in trying to establish these claims without proper representation. These cases often involve the need for technical or scientific data in the possession of the military; information they do not know exists or how to acquire.

5. The traditional veteran's organizations make an enthusiastic effort to assist veterans with their claims. Nevertheless, their expertise has often proven to be limited to matters of procedure. I have witnessed several cases where the veterans non-attorney representative failed to understand the law involved in a particular matter, and made very little effort to do more than have the veteran explain what happened, and obtain a few character references. This approach is useful to obvious cases requiring little proof, but is uneffective in those cases presenting legal or factual problems, especially in situations where the military records are missing.

6. I do not wish to malign the work of the traditional veterans organizations. They can be most helpful in representing veterans. However, their legal training is often limited, and their workloads often preclude giving each case the attention it may require. As a consequence, their assistance in unusual cases is often ineffective; raising false

hope with the veterans being represented. I represent veterans at the administrative appeal stage of V.A. proceedings. Almost all of my clients were represended by traditional veterans groups at the proceedings below, decisions that were often reversed once an attorney became involved.

7. Few lawyers have bothered to become familiar with veterans law due to the token compensation allowed. The few of us that are willing to represent veterans without compensation are limited in the number of pro bono cases we can handle. As a consequence, there are veterans improperly being deprived benefits who cannot obtain the effective representation they require. I have regretfully declined to represent veterans at times due to this severe fee limitation. Such cases involved the need to expend substantial costs to acquire the proof needed, amounts that would exceed my sparce reserves for pro bono work.

8. I understand the motivation behind this fee limitation. However, this effort to protect veterans has become excessive to their injury. I suggest that reasonable representation can be compensated while limiting the apprehension that an unconscionable portion of the veterans benefits would be diverted to overzealous attorneys'. Social Security claimants can obtain attorney representation. Attorneys are normally paid only if they prevail, the compensation normally comes from the retroactive lump sum payments due and not current monthly payments, and the fee must be approved by Social Security upon submission of time records by the attorney. I have represented many disabled clients before Social Security, and have found this arrangement quite effective in giving them the representation they need, without reducing the monthly payments, they rely on for survival, to pay an attorney's fee.

DECLARATION

I, JAMES L. BIANCHI, declare under penalty of perjury that the foregoing is true and correct, this declaration being executed at San Francisco, California on April 12, 1983.

/s/ _____

JAMES L. BIANCHI

DECLARATION OF JOHN BURKE
(CAPTION OMITTED)

I, John Burke, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Navy and a member of the National Association of Radiation Survivors. I live in Evergreen, Colorado. I know the facts recited herein of my own knowledge and if called upon could testify competently to them.

2. I was on active duty with the Navy from July, 1945 to October, 1947. I then went into the Naval Reserves until September, 1950, when I was called back into active duty. I was honorably discharged in September, 1951.

3. I was ordered aboard the U.S.S. Bowditch as a quartermaster on September 29, 1946. The day before that, the Bowditch had been at the Bikini Atoll in the Marshall Islands for the atomic test blasts of Operation Crossroads.

4. The Bowditch had been in the harbor of the Bikini Atoll for two months, participating in several atomic test blasts. The ship had reached the height of its radioactivity and was ordered to leave the Bikini Atoll to be decommissioned.

5. The Bowditch, with me aboard, sailed from the Bikini Atoll to Pearl Harbor, where we were quarantined until the ship got clearance to return to San Francisco for decontamination. At Pearl Harbor we were ordered to throw all of our gear overboard because it was contaminated by radiation. We were then ordered to proceed to San Francisco for decontamination. On the way to San Francisco I was ordered to scrape radioactive barnacles from the sides of the ship. In addition, on the Bowditch, I was drinking water and eating food contaminated by radiation. I was never given a radiation film badge nor any protective clothing.

6. On October 19, 1946 the ship went into drydock at San Francisco. Civilian sandblasters, who had demanded triple time pay, began removing barnacles from the sides of the ship. We inhaled the fumes from this blasting as we worked on the deck of the ship. We were ordered to throw the lifeboats overboard because they were contaminated by radiation. Scientists from the Lawrence Livermore Laboratory and from the University of California visited the Bowditch wearing protective breathing gear. I stayed aboard the Bowditch until it was decommissioned in February or March of 1947 in Norfolk, Virginia.

7. As a result of my exposure to ionizing radiation I suffer from a number of illnesses. I have skin cancer and have had three cancers surgically removed from my face. I have also had a tumor removed from my colon. I also suffer from calcification of the aorta, osteo arthritis, stomach ulcers, anemia, hypo-thyroidism and respiratory problems. Alcoholism and mental problems as a related item.

8. I filed a claim for service connected disability compensation with the V.A. in September, 1980. I was represented by the Disabled American Veterans ("DAV"). The V.A. rejected my claim because I was not aboard the Bowditch during the atomic blasts and there was no documentation to prove that my disabilities were caused by radiation. Since then, I have attempted, on my own, to gather documents to support my claim. I have refiled twice with additional evidence. Both times the V.A. again rejected my claim. When the V.A. rejected my claim the third time, I appealed to the Board of Veterans Appeals ("BVA"). I was told by the V.A. that I would have to wait two to five years to get a BVA hearing in Denver. Therefore, I traveled to Washington, D.C. at my own expense for a hearing before the BVA. The hearing was held on May 11, 1983.

9. I was represented before the BVA by a Washington, D.C. representative of the Disabled American Veterans. He got my file about thirty minutes before I walked in the door. When I came to his office he told me that I did not have a case. He had never heard of somebody who came aboard one of the test ships after the atomic tests being exposed to radiation. Subsequently, I sent this DAV representative a great deal of information about veterans. He then asked me if I had any material that could help him with the claim of a veteran who had been at Hiroshima. It was clear that I knew a lot more than he did about veterans exposed to ionizing radiation. He did not have the slightest

idea how to handle a radiation claim. I felt that I could have done a better job representing myself.

10. At my BVA hearing there was one medical member of the BVA on the panel. Her eyes were closed throughout the hearing and it appeared to me that she was asleep. At the end of the hearing the other members woke her up and asked her whether she had any questions. She said "no."

11. I have received no assistance from my local DAV representative. I had to prepare the whole case by myself. I have drafted all of the papers that were submitted to the V.A., including my appeal to the BVA. The DAV has done no research, either legal or factual. They have made no recommendations as to what I should put in the papers that I have filed. The DAV has never counseled me as to what I need to do or what I needed to take with me to the BVA. They have done nothing except forward to the VA the papers that I submitted. They have made no effort to obtain documents to support my claim.

12. The DAV clearly thinks that I am wasting their time. Every veteran with a radiation or Agent Orange claim whom I talk to feels that the DAV is just going through the motions. Each time I contact the DAV I talk to a different representative. I have talked to three or four different representatives on three or four occasions. Each time the conversation was only ten or fifteen minutes long at most. I would be much better off if I could retain an attorney to represent me.

13. The V.A. has not assisted me in developing the evidence to support my claim. Instead, I have been stonewalled by the government at every turn. The Defense Department does not answer my letters. I have made several Freedom of Information Act requests but I have never received a response. I finally got my service records from the V.A. but all of them are illegible. Curiously, my medical records for the period before and after my time on the U.S.S. Bowditch are clearly legible but my medical records from the Bowditch are illegible. I am having a very difficult time gathering medical evidence to prove that my diseases were caused by my exposure to radiation. Because of my exposure to radiation, I had a blood test taken by the government in 1947, but the V.A. told me that there are no records of it.

14. Because of my disabilities I have been unable to work for the last four years. I receive a monthly Social Security Disability check of $465.00. My financial situation is, therefore, quite precarious. I have had to place a second mortgage on my home in order to pay the numerous medical expenses my personal health insurance does not cover.

15. I believe that if I were able to retain an attorney my claim for disability compensation would be better developed and would have a better chance of success.

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 10th, 1983 at Evergreen, Colorado.

/s/ _____
JOHN BURKE

DECLARATION OF DON E. CORDRAY
(CAPTION OMITTED)

I, Don E. Cordray, declare and state as follows:

1. I am a United States Navy veteran and one of the plaintiffs in this action. I live in Concord, California. I am fifty-five years old. I served in the United States Navy from 1945 to 1949 and from 1950 to 1966. I have personal knowledge of the facts hereinafter set forth, and, if called upon to do so, I could and would competently testify to them.

2. I enlisted in the United States Navy on October 2, 1945 and in 1946 I was assigned to the USS Fulton (AS-11) for duty at the Bikini Atoll, Marshall Islands, Pacific Ocean, during two atomic bomb test blasts known as Operation Crossroads. Both during and after these two atomic blasts, I was exposed to dangerous amounts of atomic radiation.

3. During atomic blast Able, on July 1, 1946 eighteen other men and I were positioned on the deck of the Fulton as "guinea pigs." We were the only unshielded persons on the ships. The ship was ordered to move into Bikini Lagoon immediately after Blast Able to give support to eight target vessels. These vessels were moved alongside the Fulton for two and one-half weeks.

At the detonation of Test Baker on July 25, 1946, the FULTON was 14 miles away. The FULTON remained outside of Bikini lagoon until July 30, when it anchored near the center of the lagoon.

The Fulton's logs indicate that in the four weeks following the blast the ship created over 600,000 gallons of fresh water by distilling highly radioactive sea water from Bikini lagoon.

Decontamination efforts in the months after Test Baker revealed that the saltwater and evaporators on ships in Bikini lagoon became highly contaminated with fission products. In addition, algae and other marine life on ship's hulls tended to concentrate these fission products, so that the hulls, particularly at the waterline, became dangerously radioactive. My main duty station was in close proximity to

the evaporator room, which was located on the Second Deck Belowships, at the waterline of the FULTON.

After blast Baker, the USS Fulton, with me aboard, towed the SS Skate, an extremely radioactive target vessel of Test Baker, to Pearl Harbor. We towed the Skate to Pearl Harbor at a speed of four knots and it took approximately thirty days.

The Fulton was highly contaminated with radiation during that time. At Pearl Harbor I was temporarily assigned to the ship's First Lieutenant's Department. My assignment to that department lasted for the duration of my remaining time aboard the FULTON. My duties consisted of conducting an extensive survey and inventory of all valves on the ship. As can be imagined, this inventory took many weeks. Each valve—of whatever type—had to be found, its exact location noted, the precise type of valve described, etc. This task involved each and every valve on the ship—including the evaporator room and salt water piping systems. As noted above, later studies revealed that these parts of the ship were highly contaminated. When the Fulton reached Mare Island in September of 1946, I was ordered to help decommission the ship. The ship was still hot from radiation, and it took months to decommission her. I was transferred from these duties in October 1946.

4. As a result of my exposure to radiation, I contracted and suffer from a very rare form of cancer, oat cell brochogenic carcinoma. It started in the right upper quadrant of my lungs and spread to my blood, then to my legs through the bone marrow. I have received chemotherapy treatment for this cancer. Also as a result of my exposure to radiation, I suffer from severe osteoarthritis of the spine, muscle weakness, severe pain in my lower back and hips, muscle aching and stiffness, severe headaches. In addition, injections I received after being contaminated by atomic fallout caused sciatic nerve damage. My cancer and my other disabilities prevent me from working. I currently have a 10% V.A. disability rating for a related condition.

5. While very sick with cancer and receiving regular doses of morphine to kill pain, and without the help of an attorney, I filed a Disability Compensation Claim with the

San Francisco Regional Office of the V.A. on February 7, 1977 for my oat cell carcinoma, arthritis of the spine and sciatic nerve damage. I had great difficulty representing myself and was unaware of what standards the V.A. uses to decide these cases. It was denied as not service-related. On June 21, 1977 I received a 10% disability rating from the San Francisco Regional Office of the V.A. for a related condition.

6. On September 23, 1977, while in the hospital with cancer and receiving morphine, and without an attorney, I filed with the Regional Office a Notice of Disagreement with my 10% disability rating.

7. On April 19, 1978, without an attorney, I filed an Appeal to the Board of Veterans Appeals.

8. On May 31, 1978, my accredited representative, the Veterans of Foreign Wars, filed a Statement of Accredited Representation in Appealed Case on my behalf with the V.A. This document was submitted as Exhibit A to the Complaint. It was handwritten and three sentences long. It purported to be an argument, but actually was only an extremely sketchy statement of what I "contended" and "believed." The service officer who wrote it acted like he did not even believe me.

9. Although, I did not know it at the time, I am informed that on September 14, 1978, a hearing was held before the Board of Veterans Appeals in Washington, D.C. I am informed that I was represented by Mr. Frank J. Clark of the Veterans of Foreign Wars. His presentation was extremely brief. No expert testified. The entire record of his argument takes up only one full page. It is attached hereto as Exhibit A and incorporated by this reference. On January 3, 1979 the rating decision against me was confirmed by the Board of Veterans Appeals.

10. On December 30, 1979, I filed another claim for service connection for my oat cell carcinoma. The San Francisco Regional Office of the V.A. denied service connection on August 13, 1980. I was not informed of this until October 30, 1980. I did not appeal the decision. I was extremely sick with cancer and had no one to help me, so I gave up. I wished that I could hire a lawyer to represent me but was prevented by the $10 fee limitation from doing so.

11. On November 17, 1982 I filed again for service-connected compensation for my oat cell bronchogenic carcinoma with additional evidence, including the Log Book of the U.S.S. Fulton. The Veterans of Foreign Wars did not get this evidence for me; rather, it was obtained with the help of friends from the National Association of Atomic Veterans a non-profit group (not a service organization). On January 5, 1983, my claim was denied.

12. The various service organization representatives that have represented me have never attempted to obtain evidence such as exposure data or radiation studies to support my claim. In fact, they have never contacted me at any time. Service organization representatives appear to have no idea of what atomic veteran cases are all about and make no attempt to gather evidence to support atomic veteran claims. They are either unwilling or unable to take on the V.A. in an atomic veteran case.

13. The V.A. has opposed me at every turn. They have made no effort to help me reconstruct the true dose of radiation that I have received. I have felt helpless in trying to fight the V.A. by myself. Throughout my years of battles with the V.A. I have always wanted to have an attorney represent me but could not get a lawyer because of the $10 fee limitation. I would gladly pay an attorney a reasonable amount to represent me. I am very frustated that the V.A. prevents me from doing so.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 14 day of July, 1983 at Concord, California.

/s/ _____

DON CORDRAY

EXHIBIT A

VETERANS ADMINISTRATION
BOARD OF VETERANS APPEALS
INFORMAL HEARING PRESENTATION

C 24 942 530
CORDRAY, Don E.

Hearing held in Board Room, BOARD OF VETERANS APPEALS, Veterans Administration, Washington, D.C., September 14, 1978.

Veteran represented by:

Mr. Frank J. Clark, Veterans of Foreign Wars of the United States

QUESTIONS AT ISSUE:

1. Entitlement to service connection for arthritis of the spine with sciatic nerve involvement.

2. Entitlement to an increased evaluation for service-connected duodenal ulcer.

MR. CLARK: Mr. Cordray is presently in receipt of a 10 per cent evaluation for the postoperative residuals, duodenal ulcer. He contends that the true degree of related symptoms has not been recognized by the regional office. In addition, he contends that he suffers from a chronic low back disorder with sciatic involvement which was either incurred in or aggravated by military service.

The originating agency noted the service clinical records of October 1947 regarding back complaints. The further noted that subsequent clinical records through date of retirement in July 1966 made no mention of a back disorder.

The initial claim for service connection was filed in February 1977. There is of record a report of an orthopedic consultation apparently dated December 11, 1971 and received by the originating agency in March 1977. Of particular importance is the historical information provided on the report. It is shown in part that Mr. Cordray had experienced lumbosacral back pain for the previous 10 years. This would have placed the date of onset well before retirement from active duty.

The aforementioned historical information was provided back in December 1971 or some five years prior to the date of the initial claim. Obviously, the history must be accepted

as fact since it would only have been provided for clinical purposes.

Additional postservice medical information dealing with the low back disorder was provided on a report received on March 28, 1977, and signed by Dr. Ralph D. Kirk. Yet further information is set forth on a report from Robert B. Jackson, M.D., received on July 25, 1977.

SUPPLEMENTAL DECLARATION OF DON E. CORDRAY (CAPTION OMITTED)

I, Don E. Cordray, declare and state as follows:

1. I am a veteran of the United States Navy and one of the individual plaintiffs in the above entitled action. I know the facts recited herein of my own knowledge and if called upon could testify competently to them.

2. I was exposed to radiation during Operation Crossroads, a two blast atomic test series at Bikini Atoll in the Marshall Islands in 1946. Without the assistance of legal counsel, I filed V.A. service connected disability compensation claims for my radiation caused illnesses in 1977; 1979 and 1982. All of these claims were denied by the V.A. on grounds of lack of proof. I was represented before the V.A. by the Veterans of Foreign Wars.

3. After the Complaint was filed in the above-entitled action, Morrison & Foerster finally found a lawyer who would represent me for free. His name is Bruce Lymburn. At the time, he was an associate at the firm of Feldman, Waldman and Kline. He is presently associate general counsel with Grovenor Properties, Inc.

4. The representation that I have obtained from Mr. Lymburn has been far superior to the representation that I obtained from the Veterans of Foreign Wars, and to the representation that I was able to provide for myself.

5. The first thing that Mr. Lymburn did for me was to read the vast amounts of materials on Operation Crossroads and its radiation hazards. These materials consisted of about 1,000 pages of official documents, many of them technical in nature. These were mainly supplied to him by me. I had read some of these materials, but my lack of a technical background prevented me from knowing which of the materials were particularly relevant to my case. Mr. Lymburn's background aided him in his analysis of these materials.

6. In addition to analyzing the documentary evidence of Operation Crossroads, Mr. Lymburn familiarized himself with the rules of procedure and the standard of proof applicable to VA disability claim cases. He also collected considerable amounts of medical literature on the health effects of ionizing radiation.

7. From the outset it was clear to Mr. Lymburn that the main issue in the case would be the amount of radiation I received. The Navy claims that I could not have received more than .24 rem gamma during Operation Crossroads. From the materials Mr. Lymburn read, he thought that the Navy's estimate was far too low.

8. Mr. Lymburn contacted Dr. Henry Vyner, a physician in Berkeley who works in the field of radiation and medicine, to get his opinion as to the best way to challenge the Navy's dose estimate. He suggested that Mr. Lymburn obtain a dose reconstruction for me, and he suggested several persons who might do the work. One of the persons Dr. Vyner suggested in turn referred Mr. Lymburn to Anthony Greenhouse, a health physicist who manages the Personnel Dosimetry Office of the Lawrence Berkeley Laboratory of the University of California at Berkeley.

9. Mr. Greenhouse agreed to conduct a retrospective dose assessment for me. To do so he needed to know (1) the levels of radioactivity documented on my ship, the U.S.S. FULTON (AS-11), or on other ships at Bikini whose circumstances were similar to the FULTON, and (2) the lengths of time I spent in proximity to known radioactive areas.

10. Since Mr. Lymburn was very familiar with the Crossroads documents he was able to provide Mr. Greenhouse with what he needed in the first area. In addition, Mr. Lymburn and Mr. Greenhouse collaborated on three Freedom of Information Act requests which revealed very important evidence. Mr. Lymburn spent considerable time with me talking about my activities aboard the FULTON. My memory was refreshed by examining three ship's blueprints for the FULTON Mr. Lymburn had obtained from the Navy.

11. From my descriptions of my activities aboard the FULTON, and the Crossroads evidence Mr. Lymburn obtained, Mr. Greenhouse prepared a dose reconstruction for me. Using very conservative assumptions and scientific techniques, Mr. Greenhouse calculated my radiation dose

during Operation Crossroads to be in excess of 10 rems. This is about 43 times the Navy's estimate, and more than twice the maximum annual radiation dose permitted under modern radiation dose standards in effect in the United States today. In addition, my reconstructed dose is far greater than the doses documented in successful appeals to the Board of Veterans Appeals.

12. Mr. Greenhouse's dose reconstruction forms the foundation for my appeal. Mr. Lymburn is currently in the process of writing the brief in my case, and he should be finished in the next few weeks. He expects to have a hearing before the VA in my case by late this year or early next year.

13. I am very glad that I finally have an attorney to represent me. For years I was unable to find a lawyer to help me because of the $10 fee limitation. Very few lawyers are willing to provide their services for free.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9 day of November, 1983.

/s/ _____
DON E. CORDRAY

AFFIDAVIT OF HOWARD J. DE NIKE
(CAPTION OMITTED)

I, HOWARD J. DE NIKE, declare as follows:

1. I am an attorney duly licensed to practice law in the State of California. My practice has centered for the past fifteen years upon representing persons with military law problems. These cases cover virtually every possible military law forum, including general and special courts-martial, the United States Court of Military Appeals, the Army and Navy Courts of Review, the United States Court of Claims, the Board for Correction of Naval Records, the Army and Air Force Boards for Correction of Military Records, the Army, Navy and Air Force Discharge Review Boards, and the federal court system from district court to the United States Supreme Court.

2. I have written numerous articles on the subject of military law for publication, including, "The New 'Problem Soldier'—Dissenter in the Ranks," Indiana Law Journal, Vol. 49, p. 685 (1974), which described my experience during two years of employment with the Lawyers Military Defense Committee which were spent in Vietnam, the Philippines and the Republic of Germany.

3. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. §§ 3404-3405, and the nature of the plaintiff's claims in this action.

4. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

5. Because of my well-known specialization in military law and my Yellow Pages listing under that heading, I frequently receive inquiries from prospective clients seeking assistance on Veterans Administration claims. I would estimate the number of such inquiries as from two to three per week. Invariably, I must turn these requests for representation down despite 1) apparent merit of the claim, 2) a strong plea from the claimant to accept the case with an ability to pay a reasonable retainer, 3) and my own belief in my qualification to handle the case.

6. The reason for declining to accept such cases described above is the provisions of 38 U.S.C. §§ 3304-5. When I decline to accept such cases, I try to refer the claimant to an agency. This is because the process of submitting an initial claim or appealing a denial can involve complex issues and forms which are commonly beyond the capabilities of the average layperson.

7. In many cases where I refer an individual to an agency which can handle VA claims free-of-charge, I learn that the individual has previously sought assistance from the same agency and is either dissatisfied or not eligible for some reason. The expressions of dissatisfaction usually mention inadequate contact with agency representatives, leading to lack of preparation and a perceived absence of zeal on the part of agency personnel in advocating the client's interests.

8. Often, the claims of veterans are subject to being addressed in more than one forum, such as the Veterans Administration and the Board for Correction of Military/Naval Records. In such instances, I will take the matter before the non-VA Board, but I must decline to represent my client before the VA despite the obvious advantages in doing so. My reason for this is to steer as wide as possible away from the prohibitions of 38 U.S.C. §§ 3304-5. I do not want to be in an ambiguous position where my fee could be characterized as being received for representation of the veteran before the VA.

9. In numerous instances over the years, I have had occasion to seek records from the VA to assist my representation of a client before a forum other than the VA. The difficulties I have encountered in accomplishing even such a simple task, lead me to conclude that virtually anyone who must deal with the VA would be substantially benefitted in having a representative who is thoroughly versed in VA bureaucracy and procedures.

10. In my experience, there is no reason to believe that granting private attorneys access to appear on behalf of clients before the Veterans Administration would result in any more overreaching or unscrupulous practices than 1) presently exist among those laypersons who presently

"counsel" claimants outside recognized agencies, or 2) exists among attorneys in general in their handling of other types of cases. Granting access could well curtail the former source of unscrupulous practices since the client is assured a greater measure of ethical conduct through the enforcement mechanisms of the State Bar.

/S/ _____
HOWARD J. DE NIKE

Subcribed and sworn to
before me this 28th
day of April, 1983.

_____
NOTARY PUBLIC
in and for the State of California

DECLARATION OF GLENN DORFMEIER
(CAPTION OMITTED)

I, Glenn Dorfmeier, declare and state as follows:

1. I was a participant at Operation Sandstone at Eniwetok Island in 1948, which included atomic test Shot X-Ray on April 14, 1948.

2. Shot X-Ray and the other Operation Sandstone blasts caused contamination of the groundwater at Eniwetok Island, which I and the other crew members used for drinking and bathing. Specifically, the groundwater reservoir was contaminated by radionuclides of iodine washed away from drone planes.

3. Radiation affects the biological function of the thyroid. As a result of my exposure to radiation at Operation Sandstone, I suffer from hyperthyroidism and thyroid dysfunction.

4. On December 22, 1978 I filed a claim for V.A. Disability Compensation with the Northern California office of the V.A. On July 31, 1979, my claim was denied.

5. On July 8, 1981, I had an oral hearing before the Board of Veterans Appeals in Washington, D.C. The Board remanded my claim for thyroid dysfunction evaluation.

6. The V.A. has adamantly denied my claim of service-based disability, despite convincing evidence of service connection.

7. The V.A. did not attempt to obtain evidence to support my claim but relied on a report of the Defense Nuclear Agency which stated that there were no records of radiation levels of drone planes. This was refuted by information I obtained under the Freedom of Information Act. This information was only obtained after the intercedence of Congressman Tony Coelho.

8. The V.A. also relied upon the Defense Nuclear Agency's claims that thousands of rems of radiation exposure is necessary to cause undue abnormal physiologic function in the thyroid, and that there is no such thing as a latent effect in the development of radiation induced thyroid abnormalities. I, a sick and disabled veteran, managed to discover the thyroid research work done on the Marshall Islands by Conrad's group at Brookhaven National Laboratory and the research that Dr. Greenspan of the Department of Medicine at the University of California at San Francisco published in the same field, disproving these claims. The V.A. repeatedly refused my requests for evaluation of my condition by Dr. Greenspan, who was the consulting endocrinologist during my hospitalization from November 7, 1978 to November 16, 1978, the record on which my claim is based.

9. Based on my experience I suspect that any medical evaluation that would give credibility or support to the claim of an atomic veteran is ignored or suppressed by the V.A.

10. The Board of Veteran Appeals ordered the V.A. to arrange for me to be examined by an endocrinologist. The V.A. refused my request to have Dr. Greenspan perform the evaluation. Instead, the evaluation was performed by Dr. Jeffrey S. Mason. My historical medical records were not forwarded to Dr. Mason by the V.A., despite the direct instructions of the Board of Veterans Appeals to do so. Still, the conclusion of Dr. Mason's evaluation was not unfavorable to me. It was, however, omitted from Supplemental Statement of the Case prepared by the V.A. I was able to determine this only after making a Freedom of Information Act request for Dr. Mason's evaluation.

11. My experience representing myself before the V.A. and especially before the Board of Veteran Appeals, has been very frustrating. Far from assisting me, the V.A. has hindered my attempts to obtain and present evidence in support of my claim. The Board of Veterans Appeals refused even to tell me what evidence I needed to prevail on my appeal. I cannot believe that the V.A. calls its adjudication system "non-adversarial." The V.A.'s attitude toward me has been very adversarial through the entire adjudication process.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of July. 1983 at Fresno, California.

/s/ _____

GLENN DORFMEIER

DECLARATION OF CHARLES E. JOECKEL, JR.
(CAPTION OMITTED)

I, Charles E. Joeckel, Jr., declare and state as follows:

1. I am the National Director of Services for the Disabled American Veterans (DAV), a nonprofit, national, veterans service organization chartered by Congress in 1932 with a present membership of more than three quarters of a million wartime disabled veterans. Nearly 30% of the DAV's membership is made up of disabled veterans of the Vietnam War period.

2. The DAV has many programs designed to accomplish its goals of assisting disabled veterans in their struggles to regain their health, reshape their lives to cope with their disabilities, learn new trades or professions, and rejoin the civilian world as fully productive citizens. Among our major programs is the National Legislative Program through which DAV promotes reasonable, responsible legislation to assist all disabled veterans, their families, and their survivors. The DAV's National Employment Program, in addition to filing hundreds of job discrimination complaints on behalf of disabled veterans, works closely with the National Alliance of Business, the President's Committee on Employment of the Handicapped, and other public and private organizations to make equal employment opportunity a reality for all disabled veterans. The DAV's Vietnam Veterans Outreach Program has assisted over 150,000 veterans, who needed a hand in coping with the harsh effects of the Vietnam War.

3. One of DAV's most important programs is its National Service Program. In this program, the DAV assists disabled veterans and their families in obtaining disability compensation, death benefits, pension, and other benefits provided not only under laws administered by the Veterans Administration, but under other Federal, state, or local laws as well.

4. The services provided under this program include much more than simply counseling veterans and their families concerning benefits. DAV National Service Officers

(NSOs) assist in filing claims, prepare briefs, assemble evidence in support of claims and appear on a claimant's behalf at oral hearings. In short, NSOs provide all the services necessary to fully represent a claimant at all administrative stages of the benefit claims process.

5. DAV employs 251 NSOs on a full-time basis. All NSOs are accredited by the Veterans Administration to represent claimants and more than 95% of them are seriously disabled veterans of the Vietnam War. Veterans need not be members of the DAV to take advantage of the free services provided by the NSOs.

6. NSOs are assigned to each of the Veterans Administration Regional Offices throughout the United States and Puerto Rico. In addition, NSOs are assigned on a permanent basis at six Veterans Administration Contact Offices and four Medical Centers. Our Appeals Staff consists of 10 National Appeals Officers assigned to the Board of Veterans Appeals.

7. The vast majority of NSOs received on-the-job training under the auspices of 38 U.S.C., Chapter 31, the Veterans Administration Vocational Rehabilitation Program. The duration of this training, as well as related classroom instruction, is 16 months. A general description of the DAV's formal training regime is attached. The training is provided by the office's Supervisor with direct input from other staff members where appropriate.

8. As noted in the attached training description, during the formal training period instruction is given covering all aspects of Veterans Administration benefit programs, including but not limited to, compensation and pension; vocational rehabilitation; medical care; education; insurance; home and small business loans; death benefits; job counseling; employment and reemployment rights; and related general benefits. NSO trainees are introduced to the various laws and regulations governing Veterans Administration benefits and entitlements as well as the procedures used in adjudicating claims. In addition, they become familiar with, and use on a daily basis, the various manuals, program guides, and circulars published by the Veterans

Administration for use in the administration of the various benefit programs.

9. Although the formal training period is 16 months, NSO training and education continue thereafter. DAV National Service and Legislative Headquarters periodically conducts intensive training seminars for our NSOs.

10. NSOs have a great variety of resources available to assist them in providing expert representation to claimants. For example, NSOs have access to Veterans Administration libraries and resources, such as Administrator's Decisions and Opinions of the General Counsel as well as the publications listed in paragraph 8. They also have access to medical consultants as well as their associates for opinions and assistance in individual cases. At the appellate level, our Appeals staff has direct and easy access to the Veterans Administration Central Office libraries, including the law library and the BVA library. Another extremely valuable and often used resource is the Appeals Index Retrieval System we have obtained for our Appeals office. This system contains, on microfiche, all Board of Veterans Appeals decisions rendered since mid-1977 and enables a National Appeals Officer to quickly and thoroughly research specific issues that may arise in a particular case. DAV also employs, on a part-time basis, a board qualified physician in internal medicine on our Appeals Staff. This physician serves as a consultant to provide expert medical opinions in appropriate cases.

11. Two other attributes of the representation provided by DAV are worthy of mention. First, all DAV NSOs are wartime disabled veterans with service-connected, wartime disabilities. Like the clients they represent, they have had to learn to face the handicaps that overshadowed their futures. Thus, they are able to relate to and understand the plight of the claimants they serve, not on the level of a cold business relationship, but on the personal level of individuals who have shared similar, painful and tragic experiences. Second, NSOs develop a certain rapport with Veterans Administration Employees due to their everyday contact and their common goal of assisting veterans, and their families and survivors. Obviously, it is difficult to estimate the exact value of this rapport, but its beneficial nature should not be overlooked.

12. While DAV NSOs are responsible for handling thousands of benefit claims every year, some of these are routine requiring minimum effort other than assisting a claimant in filing his or her claim. In most cases, the Veterans Administration itself obtains the records or evidence necessary to adjudicate the claim. Obviously, it is the non-routine cases, particularly at the appellate level, which require the greatest effort from any claimant's representative.

13. Available VA statistics provide some insight into the relative merits of DAV representation as compared to that provided by attorneys at least at the appellate level. In Fiscal Year 1982, the DAV provided representation in 40% of all cases decided by the Board of Veterans Appeals. During that same period attorney/agent representation accounted for only 2.4% of the appeals disposed. For Fiscal Year 1979 through 1982, the average allowance rate in cases in which DAV was designated representative was 13.3%. The average allowance rate for attorneys/agents was 13.2%. During this same period, remand decisions in DAV represented cases averaged 14.7% and in attorney/agent cases, 15.35%. The average allowance rate for DAV and attorneys/agents at the appellate level in Fiscal Year 1972 through 1982 is almost parallel with DAV showing a slightly higher percentage for the last four Fiscal Years.

14. I personally believe that two inferences can be drawn from this data. First, DAV representation is better than that provided by attorneys and agents. Second, the higher remand rate for attorneys and agents indicates their preparation of appellate cases, particularly in regard to accumulating evidence to substantiate a claim is more likely to be inadequate than that done by DAV representatives. These conclusions are clear and compelling, particularly, in view of the fact that attorneys are in the enviable position of having the freedom to select those cases in which they wish to represent a claimant within the Veterans Administration system. It is clear that attorneys may only choose to accept cases in which, in their judgment, a favorable decision will ensue since they have the freedom to decline a claimant's request for representation.

Unlike attorneys and agents, DAV represents each and every claimant who requests representation, regardless of whether the claimant is a DAV member and regardless of the strength or weakness of the merits of the case.

15. DAV's involvement in complex cases such as those involving radiation exposure and post-traumatic stress disorder, both at the Regional Office level and at the Board of Veterans Appeals, has been extensive over the years. Although no statistical data is separately maintained for such cases, I am sure that claimants represented by DAV have enjoyed a degree of success at least equal to that experienced by claimants represented by other service organizations, attorneys or agents. An example of DAV's concern with respect to the issues raised in complex cases is illustrated by the fact that DAV initiated and funded the research and studies that led to recognition of post-traumatic stress disorder by the medical community at large which included the condition in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* and by the Veterans Administration as a ratable entity for disability compensation.

16. In conclusion, I would only reiterate that DAV NSO are extensively trained professionals who have both the ability and the resources necessary to provide expert representation for Veterans Administration benefit claimants in all cases, including those involving the most complex issues. And, I would add that in my experience, the only criticism leveled at these dedicated individuals comes from a relatively few claimants who are obviously disgruntled by the denial of their claims and attorneys whose self-interest is equally obvious and that the knowledge of an experience in the area of veterans affairs of both is extremely limited.

17. I declare and state under penalty of perjury that the information set forth herein is true and correct, to the best of my knowledge and believe.

/s/ Charles E. Joeckel, Jr.
CHARLES E. JOECKEL, JR.
National Director of Services
Disabled American Veterans

Executed on NOVEMBER 16, 1983

ON-THE-JOB TRAINING PROGRAM FOR NATIONAL SERVICE OFFICERS, DISABLED AMERICAN VETERANS

SECTION I. THE PROGRAM

A. JOB DESCRIPTION: Advises and assists veterans or their dependents in presenting claims for disability compensation, death or injury insurance, [education and rehabilitation,] and other claims for benefits to which they may be entitled under Federal, State or local laws; evaluates validity of claim by reviewing legislation, regulations and precedents, and by studying veterans' medical report and service history. Obtains claimants' power of attorney. Prepares claim forms and briefs, and assembles pertinent evidence. Requests hearing before proper Government board, and orally presents brief. Reviews board decision to decide whether appeal is warranted. Advises veteran on programs and services for which he may be eligible, working in cooperation with the Veterans Administration and other Government agencies. Acquaints field representatives with current activities and legislation by preparing bulletins and initiating correspondence. Participates in, or initiates civil functions, such as panel discussions and radio programs to acquaint public with services rendered and rights and benefits of veterans and dependents. May offer technical advice at congressional or other governmental hearings.

B. HOURS OF WORK: 8 hours per day; 40 hours per week.

C. LENGTH OF TRAINING PROGRAM: The training program will generally not exceed 25 months, of which 16 months will be on-the-job training and up to 9 months or two semesters of academic instruction depending upon the needs of the veteran.

D. TRAINEE WAGE SCALE [AND SUBSISTENCE ALLOWANCE):

Period	Monthly Wage	Monthly Subsistence Allowance W/O Dep	1 Dep	2 Dep	Add'l Dep]
1st 4 months	$625	$197	$238	$275	$292
2d 4 months	675	197	238	242	242
3d 4 months	725	192	192	192	192
4th 4 months	775	142	142	142	142

The journeyman wage is $917 per month.

E. ON-THE-JOB TRAINING PROGRAM, NATIONAL SERVICE OFFICER

	Estimated Hours
I. Orientation in VA Regional Office	40
Office procedure — Layout — Personnel, etc.	
II. Work in Compensation Areas	1290
Claims — Aggravation — Presumptive — Rates, etc.	
III. Work in Pension Areas	400
Applications — Old and New Pension Law — Aid and Attendance — Medication — Income, etc.	
IV. Special Service Connected Benefits	150
Automobile — Housing — Prosthetics — Hospital Rating — CSC Preference — Blind, etc.	
V. Medical — Hospital Care — Outpatient	200
Entitlement — Priorities — Domiciliary — Nursing Home — Reimbursement, etc.	
VI. Education	170
Vocational Rehabilitation — [Dependents] [GI bill]	
VII. Life Insurance	100
Government — Servicemen's Group	
VIII. Death Compensation	137
Before January 1, 1957 — DIC After January 1, 1957 — NSC Death Pension — Gratuity — Burial, etc.	
IX. GI Loans	80
Dates — Financing — Interest — FHA Insured Loans, etc.	
X. Chapter Work	100
Organization — Drives — Speaking, etc.	
TOTAL AMOUNT	2,667

F. RELATED INSTRUCTION:

Academic instruction will be provided as needed by the individual. Determination of courses to be taken will be based upon findings in counseling and in consultation with the vocational rehabilitation specialist and National Service Officer. It is not expected that such training will require more than two semesters or 9 months if training is taken in post-secondary courses. Instruction may be provided in colleges, below college level institutions, or individual instruction, as appropriate.

Academic instruction [may be pursued] before induction into on-the-job training, [ ] concurrently with on-the-job training, [or partly on one basis and partly on the other. Factors which will enter into detrmining how academic courses are to be scheduled are whether the veteran has the basic academic skills needed to perform the tasks required of a trainee and whether the total amount of academic work that the veteran needs exceeds that which can reasonably be pursued concurrently with on-the-job training. Such concurrent training generally should not exceed more than two courses per term.

In determining whether academic work pursued concurrently with on-the-job training should be scheduled during the day or after work, careful consideration must be given to such factors as severity of the veteran's disability, his or her previous academic record, and whether the needed courses are available in other-than-work hours. Courses which have been found most helpful are those which enhance communication skills, particularly letter and report writing and interviewing, and which aid in understanding physical and emotional disability.]

Text books which may be authorized for National Service Officer Trainees are:

Beeson, Paul B. and McDermott, Walsh, eds. *Cecil-Loeb Book of Medicine*, 14th ed. Philaelphia: W.B. Saunders Co., 1975.

Department of Medicine and Surgery. *Physicians' Guide: Disability Evaluation Examination*. Washington, DC Veterans Administration, 1976.

Diagnostic and Statistical Manual—Mental Disorders, 2d ed. Washington, DC: American Psychiatric Association, 1968.

Dorland, William A.N., *Dorland's Illustrated Medical Dictionary*, 25th ed. Philadelphia: W.B. Saunders Co., 1974.

Holvery, D.N. and Talbott, J.H., *The Merck Manual of Diagnosis and Therapy*, 12th ed. Rockway, New Jersey.

Anthony, C.P. and Kolthoff, N., *Textbook of Anatomy and Physiology*, 9th ed. St. Louis: C.V. Mosby Co.

Pansky, B., *Review of Gross Anatomy*, 3d ed. Riverside, NJ: MacMillan Publishing Co.

Code of Federal Regulations 38, Pensions, Bonuses and Veterans Relief. Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20420.

[The books on this list should generally meet National Service Officer trainee needs for reference material during the period of training. If additional books are requested, approval may be granted if the requested item(s) do not duplicate books on the approved list and are necessary in the trainee's individualized program.]

These books are generally available in university bookstores. When the specific edition listed is not available, another edition of the same book may be used. With the assistance of the VRS, the NSO will prepare VA Form 22-1905m, Request for Training Supplies, listing books needed for training. It is essential that necessary books be secured in timely fashion. If the veteran is attending a college for related instruction, he or she may order the books approved on VA Form 22-1905m at the college bookstore in the same manner as for the courses he or she is taking. If the books are not available, arrangement should be made with another university bookstore to issue the books to the veteran. In the unusual instance in which these books are not available at the bookstore with which agreements are in effect, an agreement will be negotiated with a bookstore carrying such technical books, or other books carrying necessary information may be authorized.

G. LEAVE POLICY. For the first year both annual and sick leave are accrued at the rate of 4 hours per month. For the second year both annual and sick leave will accrue at the rate of 8 hours per month. However, for the first 90 days any absence will be without pay. Holidays with pay will be only those recognized by the Federal Government.

H. FRINGE BENEFITS:

1. Insurance: Group Life, Blue Cross and Blue Shield, [and Delta Dental Plan] are provided after 6 months' continuous employment.

2. Retirement: Provided to full-time employees under age 64 with at least 1 year of continuous employment.

I. OTHER ADMINISTRATIVE POLICIES: With few exceptions, the place of training and subsequent employment will be the same. Transfer will be made by joint decision of appropriate VA and DAV personnel. In these cases, the veteran's transportation will be authorized by the VA in accordance with VA Regulations 10266 and 10267. DAV will pay the cost of transportation for the veteran's dependents as necessary. Prior to completion of training, a 2-day orientation program will be conducted at DAV National Headquarters, Cold Spring, Kentucky, with the veteran's transportation to be borne by the Veterans Administration in accordance with existing regulations. [Payment of travel to other DAV meetings, such as conventions, may not be approved.]

J. VA Form 22-1904, Agreement to Train On-the-Job Disabled Veterans, will be executed in each case in which a veteran is entered into NSO training under this program.

DECLARATION OF R. CHARLES JOHNSON
(CAPTION OMITTED)

R. CHARLES JOHNSON, first being duly sworn, hereby states and declares as follows:

1. I am an attorney duly licensed to practice law in the State of California, and have been so licensed since 1978. My practice includes a large number of active duty military and veteran clients, and I have considerable experience in veteran's matters. I am neither a member of the organizational plaintiffs nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 USC §§ 3404-3405 and the nature of plaintiffs' claims in this action.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

3. As a certified law student I worked with the veterans' organization, Swords to Plowshares, in San Francisco, California. During my employment with that organization I familiarized myself with the claims process of the Veterans' Administration and represented veterans at various stages of that process. I quickly learned that the Veterans' Administration is a complex bureaucracy with its own set of statutes, rules and regulations. In many cases it was my experience that the complexity of issues presented by a veteran's claim, coupled with the procedural hurdles, are far beyond the comprehension or ability of most veterans.

4. Many of the claims being adjudicated by the Veterans' Administration today, such as claims involving atomic radiation, Agent Orange, and Post-Traumatic Stress Syndrome, involve more legal and procedural complexities than do many judicially litigated matters. In my experience working with dozens, if not hundreds, of veterans, I find that issues such as causation, burden of proof, administrative presumptions, and statutory time limits render many veterans incapable of adequately presenting a claim to the Veterans' Administration. Likewise, most veterans with whom I have had contact are either unaware of, or lack the expertise to utilize, their rights to present witnesses, present documentary evidence, present their case at a hearing,

exercise appellate rights, and exhaust administrative remedies.

5. Some organizations, such as the American Legion, Veterans of Foreign wars, and so on, provide lay representatives to assist veterans in presenting claims to the Veterans' Administration, military discharge review boards, and other agencies. In most cases, however, my experience has been that those representatives are inadequate. I have reviewed numerous cases in which potentially strong issues were not raised by the veteran (and in many cases were therefore forfeited) because his or her service organization representative either failed to spot the issue or simply did not understand that it was an issue. It is normal policy with many of these lay representatives from service organizations to not even review the veteran's case until the day of a hearing. In the main, those organizations simply lack the training, expertise and resources to do a proper job. The only exception to that which I have encountered in my thirteen years in this field is Swords to Plowshares, where veterans' representatives are given extensive training and are supervised by one or more attorneys and in many cases are themselves attorneys or law students.

6. Because of the fee limitation imposed under 38 U.S.C. §§ 3404-3405, neither I nor most other private practitioners are willing to accept a Veterans' Administration matter. I have personally declined to represent dozens of veterans who have consulted me regarding a Veterans' Administration claim solely because of the fee limitation situation. Ten dollars, the maximum fee allowable under the subject statutes, is rarely sufficient to cover an attorney's out-of-pocket costs such as parking fees, postage, photocopy costs, and so on; it clearly can not cover an attorney's ongoing overhead costs for time spent on such a case. Because of my reputation as an attorney with considerable expertise in military law matters I am often contacted by other attorneys confronted with a military or veteran's issue. Invariably fellow attorneys, when advised of the provisions of 38 USC §§ 3404-3405, respond that under that cir-

cumstance they are economically precluded from assisting the veteran, and so must decline the case.

7. Any contention that the Veterans' Administration claims process is non-adversarial, and that therefore representation by experienced lawyer counsel is unnecessary, ignores reality. In actual fact, the mood of a Veterans' Administration claim process is that the claim will be denied until and unless the veteran convinces the agency otherwise. The veteran claimant carries the burden of proving his or her cliam, is generally unable to discover or obtain government documents, has no power to subpoena witnesses, and has no recourse to judicial review even in the grossest cases of abused discretion. In essence, the Veterans' Administration acts as both the opponent and the judge, a clear conflict of interest. Moreover, the decision of the "judge" in a Veterans' Administration case, unlike that of an Administrative Law Judge, is not subject to review in a real judicial forum.

8. In essence, the Veterans' Administration claims process is exceedingly complex. Without the assistance of an experienced attorney, most veterans find themselves ineffectual in the face of the bureaucracy. Because of the fee limitations set forth in 38 USC §§ 3404-3405, the overwhelming majority of attorneys who might otherwise represent the interests of our veterans are economically forced to decline such cases, or to take them very sparingly on what essentially amounts to a *pro bono* basis.

9. I declare under penalty of perjury that the foregoing is true and correct, and that this Declaration was executed on March 29, 1983, at 404 San Anselmo Avenue, San Anselmo, California.

/s/ R. Charles Johnson
R. CHARLES JOHNSON

DECLARATION OF FREDERICO JUARBE, JR.
(CAPTION OMITTED)

I, Frederico Juarbe, Jr., declare and state as follows:

1. I am the Director of the National Veterans Service (NVS) of the Veterans of Foreign Wars of the United States (VFW). The VFW is a national veterans service organization chartered by Congress in 1936 with a present membership of more than 1.9 million veterans.

2. Since its inception in 1899, the VFW has pledged to "Assist Worthy Comrades, their Widows and Children." To achieve this goal, a service program was formed to provide free representation to assist individuals seeking benefits under laws administered by the Veterans Administration (VA). This program is administered by the National Veterans Service in accordance with the VFW's Constitution and By-laws. The NVS is composed of a network of dedicated personnel at the Post, Department and National levels who are current or former members of United States Armed Forces.

3. The VFW's By-laws require each Post to have a Service Officer. There are approximately 10,000 Post Service Officers who have volunteered to serve the needs of VA claimants at the local level. Under the supervision of their respective Department Service Officer, they advise Post members concerning the VA benefit system and assist veterans, their dependents and survivors in preparing claims and obtaining evidence to support them. Although not regarded as a fully skilled technician, Post Service Officers are provided training in form preparation and evidentiary development through attendance at regional and departmental schools conducted by Department Service Officers. Additional information is available to them in the *Guide for Service Officers*, a handbook on veterans benefits published by NVS. One of the principal functions of Post Service Officers is to act as liaison between the claimant and the Department Service Officer who is located at a VA Regional Office.

4. There are 137 VFW Department Service Officers located in 57 VA facilities throughout the United States. They are salaried employees and their responsibilities are primarily directed toward assisting claimants in preparing, presenting, and prosecuting claims for VA benefits. They also provide assistance with respect to benefits available from other Federal, state and local agencies.

5. The VFW's training program for Department Service Officers is structured, and although guided by NVS, is decentralized due to geographic and resource constraints. The program ranges from highly sophisticated formats requiring college level courses such as that of the Department of Michigan to less formal on-the-job systems utilized in a number of departments. In these latter systems, much of the training is provided by the incumbent Service Officer complemented by NVS Field Representatives who monitor progress and provide follow-up instruction and guidance. Technical training sessions given by the VA for its own staff are open to VFW Department Service Officers and serve as valuable sources of training. Department Service Officers meet semi-annually with NVS staff as part of their continuing training. Periodically, regional seminars on specific subjects such as VA insurance programs are sponsored by the VA and are open to VFW representatives.

6. In addition to Post and Department Service Officers, the VFW has obtained VA accreditation for 454 representatives who have undergone various levels of training.

7. At the national level, the VFW has a staff of 19 professionals who provide technical and administrative assistance to Department Service Officers as well as presenting individual cases before the VA and other government agencies. The majority of this staff are former Department Service Officers and possess the expertise to function in an advisory capacity to the VFW's network of accredited representatives and to effectively argue cases before the Board of Veterans Appeals, the VA's Compensation and Pension Service, or the military correction and discharge review boards. Those members without prior experience in the veterans benefit system are trained in all appropriate phases of law and regulations, the VA rating schedule,

medical nomenclature and etiological relationships under the auspices of experienced personnel.

8. Although each national staff member attains a high degree of proficiency in VA procedures and related subjects, individuals are also selected to develop additional expertise on complex issues such as herbicide and radiation exposure and post-traumatic stress disorders. Such specialized training allows them to function as staff coordinators and to assist other Service Officers in these areas. Training in these specialities is accomplished through extensive research, attendance at conferences, and participation on VA and other advisory panels. Additional training is available through attendance at numerous seminars sponsored by various other government agencies. Finally, emphasis at all levels of representation is placed on self-enrichment outside the formalized program to enhance a representative's knowledge and skills.

9. VFW representatives have a wide range of resources available to assist them in representing claimants before the VA. Post Service Officers who play a valuable initial role in representation are provided the Service Officer's handbook containing a step-by-step approach to veterans benefits. They also receive the VFW Magazine and departmental newspapers and a monthly publication from the Washington Office which contain current information on veteran programs. Their most valuable resource, however, is their accessibility to the Department Service Officer.

10. At the Departmental level, Service Officers are routinely furnished VA laws, regulations, and other publications including changes and amendments. In addition they are provided technical bulletins published by NVS. Department Service Officers maintain their own libraries which include these materials as well as medical information and regional office and appellate decisions acquired in the prosecution of individual cases. VA libraries containing medical and legal material as well as data processing system archives are also available, including the extensive libraries at VA medical facilities. Department Service Officers have the opportunity to consult with the VA personnel at the Regional Offices and with NVS staff members.

11. At the national level, the VFW's Washington Office has accumulated a wealth of technical resource material spanning the broad spectrum of veterans programs. The NVS staff is routinely provided VA laws, regulations and related materials along with technical information from other governmental agencies and has access to the libraries of both the Board of Veterans Appeals (including its microfiche archives of decisions) and the Veterans Administration Central Office.

12. The VFW has attained a formidable success record in its prosecution of VA claims. During the period between May 1981 to August 1983, VFW Department Service Officers collectively processed 335,996 claims covering all benefits administered by the VA. During the same period, 301,619 cases were favorably resolved. Concurrently at the appellate level, the VFW participated in 9,549 cases in which a Board of Veterans Appeals decision was rendered. Of these appeals, 1,240 were allowed and 1,733 were remanded to Regional Offices for further development. Of the remanded cases, 325 were allowed at the Regional Office level without further appellate action. In addition, the VFW presented 121 cases to the VA's Compensation and Pension Service for administrative review. Of these cases, 39 were allowed and 15 were referred to the originating VA office for further action. Although I believe these statistics are impressive by themselves, they become even more so when considering that the VFW will not refuse representation except for compelling reasons.

13. The VFW is deservedly proud of its long tradition of effective representation of veterans, their dependents and survivors in their quest for benefits through the non-adversary VA claim process. The VFW's nationwide service network assures claimants unburdened accessibility to free, expert representation. And, the co-location of VFW Service Officers with VA staff has allowed the development of an atmosphere of cooperation and understanding that clearly enhances the achievement of their common goal of providing every eligible VA claimant with every benefit authorized by law.

14. I declare and state under penalty of perjury that the information set forth herein is true and correct, to the best of my knowledge and belief.

/s/ Frederico Juarbe, Jr.
FREDERICO JUARBE, JR.
Director, National Veterans Service
Veterans of Foreign Wars of the
United States

Executed on NOVEMBER 17, 1983

DECLARATION OF THOMAS McBEE
(CAPTION OMITTED)

I, Thomas McBee, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Air Force and a member of the National Association of Radiation Survivors. I am also a member of the National Association of Atomic Veterans, to which I was elected Missouri State Chairman in late October, 1983. I currently live at 703 Clark Road in Blue Springs, Missiouri, 64015. I entered the Air Force in 1951, re-enlisted in 1955 and retired in 1959 as a buck sergeant. I served in active duty during the Korean conflict.

2. I know the facts recited herein of my own knowledge and if called upon could competently testify thereto.

3. I was ordered to the Eniwetok Atoll of the Marshall Island in February, 1956. I was a special equipment mechanic at the time and was told that I was being sent to the Eniwetok Atoll in that capacity. In fact, the Air Force used me to decontaminate airplanes immediately after each of the seventeen atomic blasts of atomic test Operation Redwing in April to July of 1956. The aircraft I was ordered to decontaminate were used directly in each of the blasts. Consequently, I was exposed to a great deal of ionizing radiation. In addition, after the next to the last blast, there was a lot of fallout in the main island where I was stationed.

4. Before I left the Eniwetok Atoll, I began to experience severe pain in the bones and muscles of my legs. The military doctors claimed it was arthritis. I was 24 years old. When I boarded the plane to leave the Eniwetok Atoll I had to walk with a cane.

5. Over the years I have been constantly plagued by pain in my legs and back. I would estimate that I have been hospitalized thirty times for the pain in the bones and muscles in my legs and back. The muscles and bones in my back and legs are deteriorating. The pain is always there. Not even morphine can stop the terrible pain in my legs. In addition,

I have problems with my blood, including anemia. I also suffer from bleeding ulcers.

6. In February 1980 I woke up coughing blood and was hospitalized for ten days with blood clots in my lungs. Since then I have again had blood clots in my lungs on two occasions.

7. I have four children. Becky, the oldest, was born before I was exposed to radiation and is perfectly healthy. Edward, Cheryl and Susan were born in 1960, 1965 and 1970, respectively. Edward has serious problems with his kidneys. Cheryl is very small in stature and has respiratory problems. Susan has a cavity in her kidneys and is always getting kidney infections.

8. I have filed disability claims with the V.A. five or six times. Each time the claim has been denied. (I have a 10% disability rating for ulcers because this condition appeared while I was still in the service.) The V.A. admits that I am 100% disabled, but claims that my disabilities are not service connected. The V.A. also claims that all of my medical records and service records were destroyed in a fire. Yet, every time that the V.A. denied my claims they cited to my medical records and service records. To this day, the V.A. has not provided me with my medical records nor my service records.

9. The V.A. sent me several notices telling me that I could waive my right to a hearing. I did have one personal hearing at St. Louis. The V.A. told me to keep my mouth shut about the atomic tests because that information was top secret and I was under a security clearance.

10. While I was at the Eniwetok Atoll I was issued five radiation film badges. I had to change badges very frequently because I was involved in decontamination. I had the highest radiation rating of anybody I knew because of my orders to decontaminate the radioactive planes. The V.A. says that I had only 3 badges and had a reading of 5.492 but they do not say anything about my other two badges. I also inhaled the radioactive mist that came from the plane. This radiation would not register on my film badges.

11. The V.A. told me that once the BVA denies my appeal that is the end of my case. I found out, however, that even after the BVA denies my appeal I can refile. What the V.A. told me was therefore very misleading. I know that many other veterans also are misled and give up after the BVA denies their appeals because they do not know that they can refile with new evidence.

12. The V.A. adjudication system is a very adversarial system. The V.A. made no effort at all to help me prove my case. Instead, they fought me at every turn.

13. I was represented before the V.A. by the D.A.V. My service officer had no idea how to handle a radiation case. He had very little knowledge of the legal issues and legal maneuvers involved and had no expertise in [] radiation area. I met with him only once, for about twenty minutes, on the day of my personal hearing.

14. Because of my disabilities I am unable to work. My wife and I live very meagerly. My medical expenses put us far below the poverty line. I am very dependent on the little disability compensation that I receive. I sorely miss the disability compensation that I am denied.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7 day of November at Blue Springs, Missouri.

/s/ Thomas McBee
THOMAS MCBEE

DECLARATION OF ELDON D. PRAISWATER
(CAPTION OMITTED)

I, Eldon D. Praiswater, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Air Force and a member of the National Association of Radiation Survivors. I currently live at 205 South 8th Street, Odessa, Missouri 64076. I know the facts recited herein of my own knowledge and if called upon could competently testify to them.

2. I served as a member of the United States Air Force for twenty years, from 1940 to 1960, when I retired as a master sergeant.

3. I participated in the atomic test Dog Blast of Operation Greenhouse at the Eniwetok Atoll of the Marshall Islands, on April 5, 1951. I was assigned to a civilian company. I was responsible for taking high speed photographs of the atomic blast. On January 15, 1951 I was assigned to the island that was the target of Dog Blast. I helped set up the equipment to take high speed photographs of Dog Blast. Immediately after the blast, I was ordered back to the target island to remove photographic and other equipment.

4. On our way out to the island we went through radioactive fallout. Then, in removing the equipment from the site, I came within about one hundred yards of the ground zero point of the blast. I could see that the tower that had been ground zero was completely gone. A tank that had been at the base of the tower was also completely gone. The roof of the half buried quonset hut in which I had worked, which was about a quarter of a mile from the site, had been blown completely off, and bottom portion filled with sand.

5. I remained at the site after Dog Blast for about two hours. I then returned to the main island and was ordered to take six showers.

6. As a result of my exposure to ionizing radiation I suffer from a number of ailments. I suffered a massive heart attack in 1965 at the age of forty-three (half the age that my father was when he suffered a heart attack). In the

mid-1960's I was also diagnosed as having sugar diabetes, arterial occlusion and high blood pressure. I also had to have an operation for a prostate condition. I had a very enlarged parotid gland removed from my left ear in 1962. I also have had a cyst and several hydroceales removed from my elbow and numerous unusual warts removed from my face. I still have a number of these warts on my chest and armpits. I have a thyroid condition that was first diagnosed in 1979. The V.A. gave me medication for this condition for a year. After a year, however, they refused to give me any more.

7. I filed a claim for service connected disability compensation with the V.A. in February 15, 1981. It was denied. I was represented by the V.F.W. In my opinion, because the V.F.W. receives funding from the government, they are afraid to press the issue of radiation related disabilities.

8. Moreover, my V.F.W. representative had no experience or training in radiation cases. I met with him only once. The meeting lasted about five minutes. I do not even know his name. He did not seek to obtain any documents to help prove my case. He retained no expert to testify. He requested no personal hearing on my behalf.

9. After the V.A. denied my claim I simply gave up. I never had or was aware of my right to a hearing. I believed that it would be useless to fight the V.A. because the V.A. possessed far greateer resources than I.

10. The V.A. made no effort to help me prove my case. For example, the V.A. had my orders and therefore knew the dates and places of my exposure. Yet they kept insisting that I provide the information. The large parotid gland on my ear was removed at a V.A. hospital in Wadsworth, Kansas, yet the V.A. has consistently told me they have no medical records of the operation. I had my heart attack in a military hospital at Richard Gebaiur Air Force Base, Grand View, Missouri. The Air Force and the V.A. hospital have told me that those medical records have been lost.

11. The V.A. disability adjudication system is a very adversarial system. I do not believe that the V.A. assists atomic veterans in any way.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 10th day of November, 1983 at Odessa, Missouri.

/s/ Eldon D. Praiswater

ELDON D. PRAISWATER

DECLARATION OF LEONARD W. SCHROETER (CAPTION OMITTED)

I, LEONARD W. SCHROETER, do hereby declare and state as follows:

1. I am an attorney licensed to practice law in the states of Washington, Masachusetts, New York and California, and admitted to practice before the United States Supreme Court. I graduated from Harvard Law School in 1951 and joined the National Legal Staff of the National Association for the Advancement of Colored People, Inc., Fund following graduation. Twenty-three years ago, I was the founding partner of the law firm, now known as Schroeter, Goldmark & Bender. The firm's ten attorneys and 43 employees primarily provide representation to victims of medical negligence, product liability, and environmental and occupational toxic torts. We also represent large numbers of industrial workers in workmen's compensation cases, and disabled people in Social Security proceedings. I have served as President of the Washington State Trial Lawyers' Association, and have been active in and an officeholder of ATLA and other legal and civic groups. I am a veteran of World War II. I have handled claims of veterans (particularly of the Vietnam period) in the context of third party litigation involving Agent Orange and claims under the Federal Tort Claims Act. I have also had clients who were victims of service-related pharmacologic experimentation and medical negligence at Veterans Administration hospitals.

2. I am neither a member of the organizational plaintiffs, nor connected with any of the individual plaintiffs herein. I am familiar with the provisions of 38 U.S.C. §§ 3404-3405 and the nature of plaintiffs' claims in this action.

3. I know the facts cited herein of my own knowledge, and if called upon could testify competently to them.

4. The $10 fee provision absolutely precludes handling Veterans Administration claims for this office, or any other I know about. We have only been able to handle veterans' claims when they have involved third parties or have had

some other feature which makes it possible to circumvent the Kafkaesque bureaucracy and draconian fee restraints of §§ 3404-3405.

5. Veterans' claims involve increasingly technical matters of scientific proof, medical causation and multiple etiology. The increasing complexity of veterans' claims parallels the increasing complexity of claims in the fields of medical negligence and product liability. No attorney can construct even a minimally adequate case and pursue a claim through the lengthy, obstructive administrative process given the ridiculous fee limitation. All of these claims are at least as complicated as claims under the Social Security or workers' compensation systems, in which attorneys receive full fees.

6. In combination, the Feres Doctrine, $10 fee limitation and Byzantine complexity of Veterans' Administration procedures result in depriving veterans of access to the legal system. Veterans almost never are able to receive legal representation, or competent representation of any kind.

7. As a group, veterans have suffered from numerous medical-legal disabilities, yet their rights are unvindicated. The fee limitation completely eviscerates whatever "paper rights" are bestowed on veterans. Although the Seattle Veterans' Action Center (SEAVAC) and the Vietnam Veterans' Leadership Project attempt to provide assistance to Puget Sound area veterans, these under-funded groups are certainly unable to fill the vacuum created by the inability of attorneys to handle veterans' claims. I do not know of any group or attorney that can or does undertake the preparation required for the submission of the numerous medical or science-based claims of veterans. It is patently obvious that these are not claims which can be handled by lay persons. Until the fee limitation is removed and the bureaucracy streamlined, veterans' rights will continue to lack any substance, and the Veterans' Administration bureaucracy will remain the graveyard of all claims. I hereby declare under penalty of perjury that the foregoing is true and correct.

/s/ Leonard W. Schroeter
LEONARD W. SCHROETER

Dated: APRIL 11, 1983

SUBSCRIBED AND SWORN to before me this 11 day of April, 1983.

/s/ Laurie Coleman
LAURIE COLEMAN
Notary Public in and for the State of Washington, residing at Seattle.

DECLARATION OF MALCOLM C. SOUNESS (CAPTION OMITTED)

I, Malcolm C. Souness, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Army. I live in P.O. Box 65 White Creek, New York 12057. I know the facts recited herein of my own knowledge and if called upon could testify competently to them.

2. I was in the Army from November 30, 1959 until October 20, 1960. Upon entering the military service I was assigned to basic training at Fort Benning. Soon thereafter, I injured my neck and back during a training exercise. There was significant damage to my spinal cord (myelopathy). To this day I suffer from cervical and lumbar spondylosis (degenerative disc disease). I have had surgery three times to correct this problem.

3. I first filed a claim for my disabilities with the V.A. in November of 1960. The government had lost all of my medical and service records. My claim was denied for lack of evidence.

4. In 1964 I went to a V.A. hospital in North Hampton, Massachusetts, for a medical examination. I told the V.A. at that time that I wanted to file a claim for compensation. I was led to believe that my claim would be considered at that time, but the V.A. took no action on it. The records of my medical examination from the North Hampton V.A. Hospital cannot be found.

5. I filed a claim again in 1970 in the Boston, Massachusetts office. It was transferred to the Providence, Rhode Island office. This office had a practice, I understand, of denying every claim automatically without checking the merits and then only considering the merits of the claim if the denial was appealed. I appealed the denial but the claim was again denied.

6. In 1974 I filed again. I represented myself and was able to obtain a 20% rating for my back condition, but benefits were not awarded retroactively. At this point I retained, on a pro bono basis, a lawyer from Worcester,

Massachusetts named Michael Brockelman. We appealed the decision, claiming that benefits should have been awarded retoractively, but the BVA thought there was no error. Mr. Brockelman asked the BVA for reconsideration, but they refused to reconsider their decision. The representation that I received from Mr. Brockelman was far superior to the representation that I had previously provided for myself and far superior to the representation that I subsequently received from the Disabled American Veterans.

7. In 1978 I filed again with the White River Junction, Vermont office of the V.A. The claim was transferred to the Albany, New York office and then to the New York City office. I asked for a hearing, but never received one. Finally, after a great deal of time I received an auxiliary statement of the case from the V.A. I finally received a hearing before the BVA in September of 1982. They remanded for a medical exam.

8. When I filed my claim in 1978 I was represented by the Disabled American Veterans ("DAV"). At least, they were technically my representative. Their actual representation has been virtually non-existent. They have done nothing to help me. They wrote one letter in an attempt to get some of my medical records, but they spelled my name wrong. The DAV has done nothing else to help me obtain evidence in support of my claim. I sent my substantive appeal to the DAV's New York City Regional Office representatives in 1979. They did nothing with it. Subsequently, the V.A. claimed that I could not raise many of the factual and legal errors committed by the V.A. because they were not certified by my substantive appeal. I charged the DAV with neglect and incompetence with the Assistant General Counsel of the V.A. I have since withdrawn the power of attorney that I granted to the DAV.

10. Throughout the years I have had a great deal of trouble representing myself before the BVA. I have made five requests for my latest medical records and have never received them. I have never been able to obtain all my service records. I have been denied due process by the BVA at every level. I have a great deal of trouble trying to write briefs myself and I am very frustrated by this. It also

costs me a lot of money to drive 40 miles to a library to attempt to figure out analogous cases. Also, because I am not a lawyer, I know that I am missing many of the legal points.

9. When I had my hearing before the BVA, I only met with my DAV officer once, on the day of my BVA hearing. The DAV officer would not make any of the arguments I wanted him to make before the BVA. There were many factual and legal errors that I wanted to raise. Yet, he told me that only three very narrow issues could be heard. When my claim went to the BVA, the BVA would only hear those three selected issues. These were not the issues that I wanted them to hear. The DAV did nothing to attempt to get these other issues before the BVA. I wrote to the Disabled American Veterans and complained about my service representative. The response I received from the Disabled American Veterans was that since I am attempting to withdraw my power of attorney, they are not going to help me. Then, subsequently, I received a letter from them telling me that if I don't respond within two weeks they are going to proceed without me.

12. I can't believe the V.A. calls itself a non-adversarial system. They have turned the claim process into an incredibly adversarial system.

13. I have written to several lawyers to attempt to obtain representation, but they have all refused to represent me before the V.A.; Legal Aid has also refused me.

14. I am unable to work because of my disability, which is steadily worsening. I am greatly in need of V.A. disability compensation in order to help support myself.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of November, 1983 in White Creek, New York.

/s/ Malcolm C. Souness
MALCOLM SOUNESS

DECLARATION OF RICHARD B. STANDEFER (CAPTION OMITTED)

I, Richard B. Standefer, declare and state as follows:

1. I am a Deputy Vice Chairman of the Board of Veterans Appeals of the Veterans Administration. The basic duties and responsibilities of my position involve the supervision of ten of the nineteen sections of the Board.

2. I have been associated with the Board since 1970. During this period, I have held various positions including that of attorney advisor, Board Member, and Chief Member and as a result I am familiar with all major aspects of the Board's operations.

3. Statistics prepared and maintained by the Board's staff record the type of representation of an appellant, either a recognized veterans service organization representative, or an attorney or claim agent, as well as appellants who were not represented. These statistics also show the representation by disposition of case, either allowed, denied, or remanded to a regional office for further development. The statistics compiled do not differentiate between attorneys or claim agents. The Board's designation of a representative as either an attorney or claim agent for this statistical category is governed by the provisions of 38 C.F.R. §§ 19.152, 19.153, and 19.154. This recording practice has existed in above described format for at least 21 years.

4. These statistics show that during the past year 86.3% of appellants were represented by recognized veterans organization claim representatives; 2.1% were represented by attorneys or agents; and 11.6% of the representation of appellants fell into the "none" category. (The "none" category includes *pro se* appellants or appellants whose representatives were close family members.) In appeals where a recognized veterans organization claim representative represented the appellant, 14.0% were allowed, 69.7% denied, and 15.3% remanded; in appeals where either an attorney or agent represented the appellant, 12.8% were allowed, 67.5% denied, and 18.6% were remanded. In the "none"

category, 11.4% of the appeals were allowed, 71.7% denied, and 16.1% remanded.

5. Although as described above, the Board's statistics do not separately rate the performance of attorneys and agents, based on my experience at the Board, I estimate that attorneys, as opposed to agents, act as representatives in approximately 98% of all cases included in the "attorney or agent" category. Accordingly, because of the small percentage of agent represented cases included in the "attorney or agent" category, the only reasonable conclusion that can be drawn is that separate performance rates for attorneys would closely approximate the rates shown in the present "attorney or agent" category.

6. I declare and state under penalty of perjury that the information set forth herein is true and correct, to the best of my knowledge and belief.

/s/ RICHARD B. STANDEFER
RICHARD B. STANDEFER
Deputy Vice Chairman,
Board of Veterans Appeals

Executed on NOVEMBER 18, 1983.

DECLARATION OF RALPH C. VAUGHAN
(CAPTION OMITTED)

I, Ralph C. Vaughan, first being duly sworn, do hereby declare and state as follows:

1. I am a veteran of the United States Air Force. I live at 2890 California Street, Apt. 305, San Francisco, California 94115. I know the facts recited herein of my own knowledge and if called upon could competently testify to them.

2. I enlisted in the United States Air Force on January 4, 1942 and served my country in World War II. I was discharged November 21, 1945 as a master sergeant with the Fourteenth Airborne Division.

3. I am seventy-one years old, sick and severely disabled. I suffer from diabetes mellitus, hypertension, arteriosclerostic cardiovascular disease, shortness of breath, chest pains, angina pectoris, and pain in my legs, hands and arms. My total monthly income is $515 from Social Security Retirement and $65.88 from a union pension.

4. Prior to April 14, 1982 I received a Veteran's Aid and Attendance Pension. On April 14, 1982 the V.A. sent me a letter stating that my pension had been awarded "erroneously" and that my benefits were terminated. The V.A. never gave me any notice before it terminated my benefits. Nor, of course, did the V.A. provide me with a pretermination hearing. I do not know why my benefits were terminated. A true copy of the April 14, 1982 letter is attached hereto as Exhibit A and incorporated by this reference. I was advised that I was not eligible for the "housebound" rating in that my income was alleged to be over the limit for that pension. This was done without any medical or financial documentation from me whatsoever. The letter stated: "Your expected income of $6,417 exceeds the limit of $6,064 applicable to you as a veteran who is housebound." In a letter dated February 8, 1983 the V.A. states, "the income limit for a veteran entitled to the housebound rate is $6,513." My income for 1982 was $5,976 from SSA; $587 from a labor union pension fund; and $54 other; for a gross net of $6,577 I had out of pocket medical

expenses of $954, giving me a total of $5,622. As a result of the termination of my pension, I am no longer provided with insulin for my disabetes by the Hospital. This alone costs several hundred dollars per year.

6. On September 13, 1983, I was examined by a psychiatrist, a neurologist and an internist at the V.A. Medical Center in San Francisco. I have a very difficult time walking and underwent this examination at much stress, including shortness of breath and leg pain, while traveling long corridors with no places to sit. According to the V.A., the neurologist says that I do not need household care, but they would not let me read his report. The V.A.'s "Supplemental Summary of Evidence and Adjudicative Action" covering that review makes no mention of the report of the internist. Similarly, the blood and urine tests, X-rays and electrocardiogram that I underwent were not made part of the record by the V.A.

7. The V.A.'s procedures seem to drag on forever. I doubt that I will still be alive by the time my case is finally decided. It is very difficult for me to keep up with all of the deadlines and procedural technicalities. Trying to keep abreast of the administrative actions taken in this case has been a monumental hurdle for me, and at times caused me so much tension that I have sought psychiatric counselling and medication, adding to expenses from my meager income. For example, in a letter dated February 8, 1983 the V.A. states, "Our records show that we wrote you on September 1, 1982 informing you that we were unable to reinstate your pension payment." I never received notice of the decision from the V.A., nor was I furnished with a copy of the decision. I am always afraid that an appeal period will expire before I receive notice of the V.A.'s latest decision. On May 10, 1983, the V.A. notified me, "We have reinstated your pension benefits for the period April 1, 1982 to January 1, 1983. We paid you as a single veteran at the household rate." The letter had been sent to an old address. I received it on August 20, 1983. I have received no pension payments from the Veterans Administration since April 1, 1982.

8. The V.A. subsequently sent me a letter stating that I have a right to a hearing, but that a hearing will not do any good. Because it is difficult for me to get about, I did not try to force the V.A. to give me a hearing. On June 7, 1983, the local V.A. office ruled against me. The claim has been sent to the BVA in Washington, D.C. I do not know what information was forwarded to the BVA. I do not know whether there has been a hearing. A true and correct copy of the Supplemental Statement of The Case that I sent to the V.A. on September 23, 1983, detailing my mistreatment by the V.A., is attached hereto as Exhibit B and incorporated by this reference. It was prepared by my nephew, F. Hans Williams, who is not a lawyer.

9. I asked the San Francisco Neighborhood Legal Assistance Foundation to represent me, but they told me that they do not handle V.A. claims.

10. I called the office of Mr. Hickman, an attorney, to ask him to represent me. I was informed that Mr. Hickman could not represent me because of the $10 fee limitation. I was also rejected by another lawyer, Mr. Dinkelspiel. I do not trust the V.F.W. to represent me because I do not think that they will be vigorous in representing me against the government. Therefore, I am defenseless against the V.A. bureaucracy. The V.A. has confused me as to the provisions and qualifications for my entitlement. For a sick and disabled person, the V.A. adjudication system is a nightmare of procedural hurdles. The $10 fee limitation prevents me from hiring an attorney to represent me in this adversarial system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 16th day of November, 1983 at San Francisco, California.

/s/ Ralph Vaughan
RALPH VAUGHAN

DECLARATION OF REASON F. WAREHIME
(CAPTION OMITTED)

I, REASON F. WAREHIME, do hereby declare and state as follows:

1. I am a veteran of the United States armed forces and a member of the Disabled American Veterans (DAV) of which I am Adjutant and Chaplain of the Vietnam Veterans Memorial Chapter 58, and of the National Association of Radiation Survivors, of which I am Director of Membership Services. I served in the United States Marine Corps from June 17, 1943 to February 4, 1947. From April 8, 1947 to December 14, 1948, I was a member of the Marine Corps Active Reserve. I served in the United States Army from January 31, 1949 to May 5, 1958, when I was honorably discharged.

2. I know the facts recited herein of my own knowledge and if called upon could testify competently thereto.

3. My first exposure to atomic radiation occurred in August and September of 1945, when I served as a member of the occupation forces assigned to a clean-up detail in Nagasaki, Japan, shortly after the detonation of an atomic bomb there. At the time of this exposure I was assigned to Company "C," First Battalion, Eighth Marine Regiment, Second Marine Division, United States Marine Corps. My unit was landed and marched to ground zero at Nagasaki, where we camped for a few days before being ordered south. No measures were taken to prevent exposure to radiation at Nagasaki.

4. My second exposure to atomic radiation occurred in April, 1953, during Operation Upshot-Knothole, Shot Simon, at Yucca Flats, Nevada. I was present at this test shot while on temporary duty from the 526th Armored Infantry Battalion, United States Army, Fort Knox, Kentucky. The unit I was assigned to, and for which I served as First Sergeant, was composed of 250 enlisted men from various military bases throughout the country. The test consisted of the detonation of an atomic bomb from a tower as a remote-controlled B-24 or B-25 bomber con-

taining a chimpanzee flew overhead. As described to us before the detonation, the bomb was slightly larger than the ones used in Japan. My unit was in a trench that was situated approximately 2,000 yards from ground zero. Protective measures were limited to covering our eyes with our hands and stuffing cotton in our ears. After the explosion, we were told via a loudspeaker to "get up and look at it." We then saw that a ball of fire was directly over our heads, indicating that we were in the "stem" of the mushroom cloud. The heat from the explosion felt like the sun burning my skin, and I and the other men in my unit experienced nausea. The explosion caused dust as thick as a dense fog, which settled on our uniforms. After watching the fireball for a few minutes, I received orders to move the men out in a skirmish line to check the damage done to the houses, sheep, and vehicles that were part of the test. I reached down to pick up the sack lunch I had left on the edge of the trench and found that it had been reduced to one small piece of charcoal. I then commanded the unit to advance to ground zero. In December, January, and February of 1953-54, I suffered a complete loss of body hair. My hair later grew back, but was much lighter in texture.

5. I have a number of service-connected disabilities, some of which I believe to have been caused by the exposures to atomic radiation described above. My non-radiation-related disabilities include loss of vision in the right eye and three gunshot wounds, one of which has left my left arm paralyzed. My radiation-related disabilities include the following: allergic reaction to metal since Shot Simon; loss of voice for five days in November or December of 1954; loss of all teeth in 1955; sterility since 1954; osteoporosis of the bone, first diagnosed in 1976; cataracts on the right eye, first noted in 1976, failure of bones, muscles, and nerves to heal from injuries; atrophying of muscular tissue; deterioration of muscle and bone in left leg; severe pain in leg, hip, and small of back; and lung cancer, causing three quarters of my left lung to be removed in April, 1982.

6. I have filed numerous claims for disability benefits with the Veterans Administration. I filed the first of these claims in early 1959 on the basis of my gunshot wounds, eye

injury, and sterility, and received a thirty percent disability rating on the basis of the gunshot wounds and eye injury. I filed additional claims in 1973, 1975, 1976, 1977, 1980, all of which have been denied in whole or in part. I have filed Notices of Disagreement and Substantive Appeals in most or all of these cases. The claim I filed in 1980 has twice been remanded by the Board of Veterans Appeals in Washington, D.C., and is now pending before the Veterans Administration Regional Office in San Francisco, California.

7. My representation before the Veterans Administration in 1959 was *pro per*. In 1973 I was represented by the American Legion, and since 1976 I have been represented by the DAV. The assistance I received from these service organizations, however, was minimal, and I did virtually all of the work myself. I attended conferences with my various service representatives over the years, but found that these representatives merely agreed with whatever I said. I therefore undertook to procure all documents necessary to support my claims and composed and typed the supporting statements myself. My service representatives did not file briefs on my behalf, except for a one-sentence statement regarding my claim for compensation for lung cancer. At the one Veterans Administration hearing that I personally attended in San Francisco, my service representative, G.J. Pajo of the DAV, merely introduced me and then remained silent. When I attempted to speak myself, I was cut short by the hearing officials. At a hearing on one of my claims in Washington, D.C., no representative familiar with my case was present; the representative handling my case was unable to attend the hearing due to a death in the family, and the DAV sent another representative instead. At the present time, I do not know what DAV representative is assigned to my case. When I last called the San Francisco office of the DAV, I asked for Mr. Pajo and was told he was no longer handling my case. I was not told which representative has replaced him on my case, nor did I inquire, because my experience of frustration with the DAV has convinced me that seeking help from them is not worthwhile. Generally, I have found that representatives of

the service organizations I have dealt with are overworked, ill-equipped in terms of medical knowledge, and unskilled in techniques of examination.

8. At the time I filed my first claim for disability compenation in 1959, I consulted an attorney in Washington, D.C., regarding my case. The attorney told me that he was unable to take my case because of the $10.00 fee limitation imposed by 38 U.S.C. §§ 3404 and 3405. The attorney advised me to go to the American Legion for assistance. I subsequently dealt with attorneys in connection with a 1977 claim I filed for injuries due to malpractice by doctors at the Veterans Administration Hospital in Fresno, which caused permanent damage to my left foot. I consulted three attorneys before finding one, Robert T. Durbrow, Jr., of Clovis, who was willing to take my case. Mr. Durbrow took my case on a contingency basis as a personal favor and filed suit in the United States District Court for the Eastern District of California. Sometime before trial, however, Mr. Durbrow was informed of the $10.00 attorney's fee limitation that applied to my case. After learning of the limitation, he ceased to invest any significant time or effort in my suit. The case was ultimately decided adversely to me.

9. I received little assistance from the Veterans Administration in preparing my case. I experienced difficulty and delay in obtaining responses to my requests for documents, such as copies of reports submitted to the VA by doctors who had examined me in connection with my claims. The San Francisco regional office of the VA has attempted to discourage me from exercising my right to a hearing, advising me that such a hearing would cause delay and implying that it would not result in a change in the rating board's decision. A true copy of the letter containing these statements is attached to the complaint as Exhibit H and incorporated herein by this reference. In a letter dated August 6, 1981, an adjudication officer advised me that inquiries concerning my appeal might result in delay in its consideration. A true copy of this letter is attached as Exhibit A to this Affidavit and incorporated herein by this reference. The Board of Veterans Appeals also sent me and Mr. Durbrow, my attorney at the time, a letter, dated January

22, 1982, informing me of the $10.00 fee limitation. A true copy of this letter is attached to the Complaint as Exhibit F and incorporated herein by this reference.

10. My disabilities prevent me from working. The sole source of income for myself and my wife is my monthly benefit from the Veterans Administration, which presently amounts to $549.00. Because of financial constraints, I have been unable to pay for expert witnesses to testify in my behalf before the VA and I have been unable to attend all but one of my personal hearings. On about six occasions, I have traveled from my home in Riverdale to San Francisco, a distance of approximately 225 miles, to meet with my service representatives, all at my own expense.

11. Although my initial 1959 claim was partially granted, my later claims have been largely unsuccessful. I have filed several Notices of Disagreement with the San Francisco Regional Office of the Veterans Administration, and several Substantive Appeals with the Board of Veterans Appeals in Washington, D.C. I requested personal hearings whenever possible and submitted extensive rebuttals to the Veterans Administration's versions of the facts. The BVA denied one of my claims in 1980 and remanded another of my claims in 1982. The latter claim was remanded again in 1983.

12. My experience with the Veterans Administration essentially has been one of frustration. It is my belief that the main object and effect of the Veterans Administration procedures is to discourage veterans and induce them to abandon their claims. Because of my experience as an officer in two veterans organizations, *see supra* ¶ 1, I was unable to persevere longer and to present my claims more effectively than most veterans; in all other respects, I believe my experience was typical. I personally have seen numerous other veterans with service-connected disability claims give up due to the frustration caused them by the Veterans Administration. In my own case, I have seen the VA inexplicably ignore evidence favorable to my claim, such as the statement by a VA doctor that I am "totally disabled for any form of work." A true copy of this statement is attached as Exhibit B to this Affidavit and incorporated

herein by this reference. Far from assisting veterans in the prosecution of their claims, the Veterans Administration constitutes the biggest adversary any veteran has.

I hereby declare under penalty of perjury that the foregoing is true and correct.

Dated: July 13, 1983

/s/ Reason F. Warehime

REASON F. WAREHIME

201

Veterans Administration

In Reply Refer To: 347-21 52
C 13 06 5 387

Mr. Reason F. Wiarehime
P.O. Box 398
Riverdale, CA 93656

Dear Mr. Wiarehime:

Your appeal and the records are being placed on the docket of the Board of Veterans Appeals, Washington, D.C., for their disposition. However, the records will be held in this office until their transfer is requested by the Board of Veterans Appeals.

Appeals are considered by the Board as promptly as possible, in docket order. The removal of a case from the orderly course of procedure to reply to an inquiry may result in delay in the consideration of the case.

The Board will notify you of the determination made.

Sincerely yours,

Adjudication Officer

DAV

FL 1-26
Jul 1980 PS.

EXHIBIT A

Form approved
OMB No. 74-R0004

IMPORTANT. Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.

VETERANS ADMINISTRATION
APPEAL
TO
BOARD OF VETERANS APPEALS

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print): WAREHIME, Reason F., Jr.

2. INSURANCE FILE NO. OR LOAN NO. (If pertinent):

3. CLAIM FILE NO. (Include prefix): C-13 005 384

4. IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN, INDICATE RELATIONSHIP
☐ WIDOW ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER (Specify)

5. NAME OF CLAIMANT (If other than veteran):

6. ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code):
Post Office Box 398
Riverdale, Calif. 93656

7. DATE OF DECISION BEING APPEALED: April 9, 1981

8. VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State): Regional Office, 211 Main Street, San Francisco, Calif.

REPRESENTATION ▶ See Par. 6 of instructions on reverse side: None

HEARING ▶ See Par. 7 of instructions on reverse side

9A. IS A HEARING DESIRED? ☒ YES ☐ NO

9B. IF YES, SPECIFY PLACE ☒ FIELD OFFICE ☐ WASHINGTON, D.C.

10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW. (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 7 on the reverse side.)

In reference to the Statement of the Case in the appeal of the undersigned the following argument is set forth on a paragraph by paragraph basis in answer to said Statement of the Case:

CLAIMENT"S CONTENTIONS: The undersigned contends that he is wheelchair bound due to the severity of the service connected injuries to his left arm and back. The undersigned has not been able to take Physical Theraphy Exercise treatments to strengthen his injured left leg, due to the weakness of said arm and back, consiquently the leg has atrophied to the extent of disuse causing total disability.

SERVICE: Once again I shall inform the V.A. that this veteran served on active duty with the USMCR at Fort McHenry, Maryland from April 1947 to January 1949 as a Corporal.

MARCH 26, 1980: It should be noted in the decision of the Board of Veterans Appeals hearing, that the Appellant was not a witness and the represenative for the Appellant (Disabled American Veterans) was not familiar with the case at the time of the hearing.
It should also be noted that the Board returned that part of the Veterans Contentions that he has residuals of radiation exposure to the Regional Office for appropriate action, and since that time the Regional Office has done nothing in that line.
Under Evidence in the Boards report of March it should be noted that the Veterans correct birthdate is June 23, 1926, and the military service should be as shown above.
There are numerous other discrepancies in the Boards report that had this Veteran been present at the hearing, would not have happened.

MAY 14, 1980: This Veteran has never been a patient at Palo Alto VAMC. On May 19, 1980 to June 13, 1980 this Veteran was hospitalized for examination of his pain to the back at the VAMC Fresno, at which time he was suffering extreme pain. It was discovered during said hospitalization that treatment with several Electronic devices by the Physical Theraphy Department...several times a week, kept the

DATE: May 9, 1981

12. SIGNATURE OF CLAIMANT (Or representative)

VA Form 1-9 (See reverse of this form. FEB 1977 will be used.)

EXHIBIT B

pain at a tolerable level and this treatment, on a three or four times aweek basis, is continuing at this writing, under the supervision of Dr. H.D. Bouman at VAMC Fresno.
This Veteran recieved payment for his one month hospitalization under the provisions of Para. 29, but has not been released from the hospital since that time. It is this Veterans understanding that payment at the 100% disability rate should have continued until the evaluation report of Feb. 10, 1981 (see attached SF 509) and then been reconsidered for a permanent rating by the Regional Office.

JUNE 17, 1980: The Outpatient record of this date was not a summary of the veterans condition (See attached SF509)

JUNE 30, 1980: See attached SF 509, which is a summary of this Veterans present condition.

JULY 31, 1980: No Comment.

AUGUST 18, 1980: It should be noted that this veterans military records show no Scoliosis of the spine prior to recieving the GSW to the spine, as noted after the injury in records dtd. May 1952. In fact in 1943 this Veteran was given a complete physical examination, including xray's of the spine when he was to be trained as a paramarine, at Camp Gillespie, Elcajon, California. The statement of the Scoliosis of the spine being "congenital" is a statement of opinion and is irrelevent. If xrays were normal it is quite apparent that the wounds caused nerve damage as prior to the wound the veteran had no history of back problems. It should also be noted that the veterans back pain has not been as severe in the past because he was not required to put strain on it in the past as he is required to do now with the use of crutches. However if there were no previous injuries to the back it is certain that modern physical theraphy methods would have had his leg close to normal by this time.

SEPTEMBER 24, 1980: This Veteran took a direct hit to the L1 area of the spine, and although xrays reveal no damge except curvature of the spine, it is a well known medical fact that traumatic impact to the spine causes arthritis.

OCTOBER 22, 1980: No comment

OCTOBER 28, 1980: No comment

OCTOBER 31, 1980: See answer to September 24, 1980

NOVEMBER 14, 1980: No Comment

DECEMBER . 1980: No comment

FEBRUARY 14, 1981: It is the opinion of the veteran that the examinations of Dr.'s Mahta and Downing were very poorly done. They were a waste of the veterans time, and the Veterans Administration's money. With all of the highly efficient Doctors in the Veterans Administration Medical Center, Fresno, it is hard to understand why the Regional Office insist's on sending veterans to Doctors of this caliber.

COMMENT'S ON PERTINENT LAWS: It is the opinion of this veteran that the interpre-

Page 3
Appeal to Veteran Board of Appeals
VA Form 1-9
Dtd: May 9, 1981
WAREHIME, Reason F. Jr.
C-13 005 364

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REASON FOR DECISION: (comments) It is intresting to note that the evaluator agree's that the veteran is unemployable. It seems odd that the veteran is presently rated 60% disabled and if the non-service connected disability were to be rated it would be rated at 40%; yet in the opinion of the adjuticator the 40% disability is what makes the veteran totally disabled not the greater 60%.

VETERANS NOTE: Attached please find a copy of the latest summary by the VAMC Fresno, containing a complete evaluation of the veterans present condition.

As an additional comment I would like to point out that for the past forty years this veteran has recieved no medical attention outside of that given him by the U. S..Government. It seems odd that even though this veteran is totally disabled that the Veterans Administration still maintains that it is not the Governments fault. ?????

//

Incls: SF Form 509 Medical Record

cc: Senator Cranston
Veterans File

MEDICAL RECORD	PROGRESS NOTES
2/6/81 RMS	It appears that patient has increasing difficulty in ambulating and is getting more pain and swelling in left leg. He needs a repeat PT evaluation.
2/10/81 PT	Patient was re-evaluated from 2/10/81 through 2/13/81. Patient received three evaluations: sensory (pain), manual muscle test, and functional evaluation. (See reports enclo Sensory evaluation: Patient has diminished sensation in LUE in dermatomes C5, C6, C7, C8, T1, hypersensitivity in forearm C8 and wrist area at base of C7, C5, and med hand (C8), and numbness in digit #2 dorsal surface (C6) and digi #5 dorsal surface (C8). Patient has diminished sensation of LLE - thigh anteriorly in dermatomes L1-L2-L3-L4 and in lower leg and foot in dermatomes L4, L5, S1 (anterio-latera and S1, S2 (posteriorly); numbness in L heel, and hyper-tensitivity in toes L foot dermatomes L4, L5, S1. There is also some diminished sensation (50% accuracy) in forearm and hand RUE and hypersensitivity in R lateral foot in dermatome S1. Muscle evaluation: The RUE has ROM and strength WNL. RLE has ROM and strength WNL. The trunk extensors are WNL. The abdominal muscles are fair-. The LUE shows weakness (fair) in shoulder internal rotators and external rotators. The LUE wrist and finger flexors have fair and poor and 0 grades which would classify this portion of wrist/finger controls as non-functional. Patient wears a wrist cock up splint. The LLE has fair strength and, therefore, motion control and functional use of this extremity will require an assistive device. Note: There is varying degrees of edema in the LLE lower leg and foot/ankle. There is consistent edema around malleoli and heel cord. With increased or prolonged activities there is increased edema from malleoli into the lower leg to the point of skin/brace upright contact. Functional Evaluation: Patient is essentially functional from the w/c. However, patient must use wrist splint for all activities in w/c (due to pain). Patient uses RUE for most fine motor activit with LUE only as assist.

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries put Name, Age and Address (Print, Hospital or Medical Identity)

REGISTER NO | WARD NO

Warehime, Reason
219-10-3369

PROGRESS NOTES
STANDARD FORM 509 (Rev. ...)
Approved by GSA/GSF
(Rev. 11-74) ... 104 1
509-1-C

Page 3
Appeal to Veteran Board of Appeals
VA Form 1-9
Dtd: May 9, 1981
~~ARCHIVE~~, Reason F. Jr.
C-13 005 384

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(Continue on reverse side)

PATIENT'S IDENTIFICATION (For name of patient enter last, first, middle; grade, rank, title, hospital or medical facility)

REGISTER NO | WARD NO

Warehime, Reason
219-10-3369

PROGRESS NOTES
STANDARD FORM 508 (Rev. ...)
...
...
508-110

MEDICAL RECORD	PROGRESS NOTES
DATE	
	Standing, walking activities require wrist splint (L), SLB and crutches (Canadian loftstand RUE and forearm wt. bearin crutch LUE). Patient experiences marked pain in LUE elbow, wrist/hand, with use of L crutch--although he will perform activities using the two crutches, due to the severe LUE pain and fair strength of LLE--safety is questionable. Use of one crutch (RUE) was attempted and is unsafe.
	It should be noted that during the evaluations, patient experienced pain in LUE - elbow, wrist, and hand, as well as in LLE - ankle and foot; however, at no time did the pati refuse to attempt to perform any activity requested of him.
	Susan Ben Brahmim, R.P.T.
2/16/81 RMS	Physical Therapy evaluation shows extent of motor loss in L arm and L leg. Muscle function is further decreased below PT rating by increase in pain and severe swelling (oedema) in L leg. This is getting progressively worse since calcaneus fracture. Patient is essentially wheelchair bound and uses a one arm drive wheel chair. Standing and ambulation are impossible except for a few steps, due to pain and swelling in L leg and foot, and additional pain in left arm. It is apparent that patient's ability has seriously decreased since the fracture in April, 1977.
	It should also be noted that the sensory evaluation shows an anesthetic area on the back from L1 to S1, essentially in the area of the old gunshot wound. Patient notes paresthesias down his legs from this area down.
	Impression: Patient is totally disabled for any form of work. Ability to function in activities of daily living is getting considerable less, particularly since the fall and foot fracture in 1977, due to increasing pain and oedema.

(Continue on reverse)

PATIENT'S IDENTIFICATION (For typed or written entries, use Standard Form 502, Clinical Record—Inpatient, or medical facility equivalent)

Warehime, Reason
219-10-3369

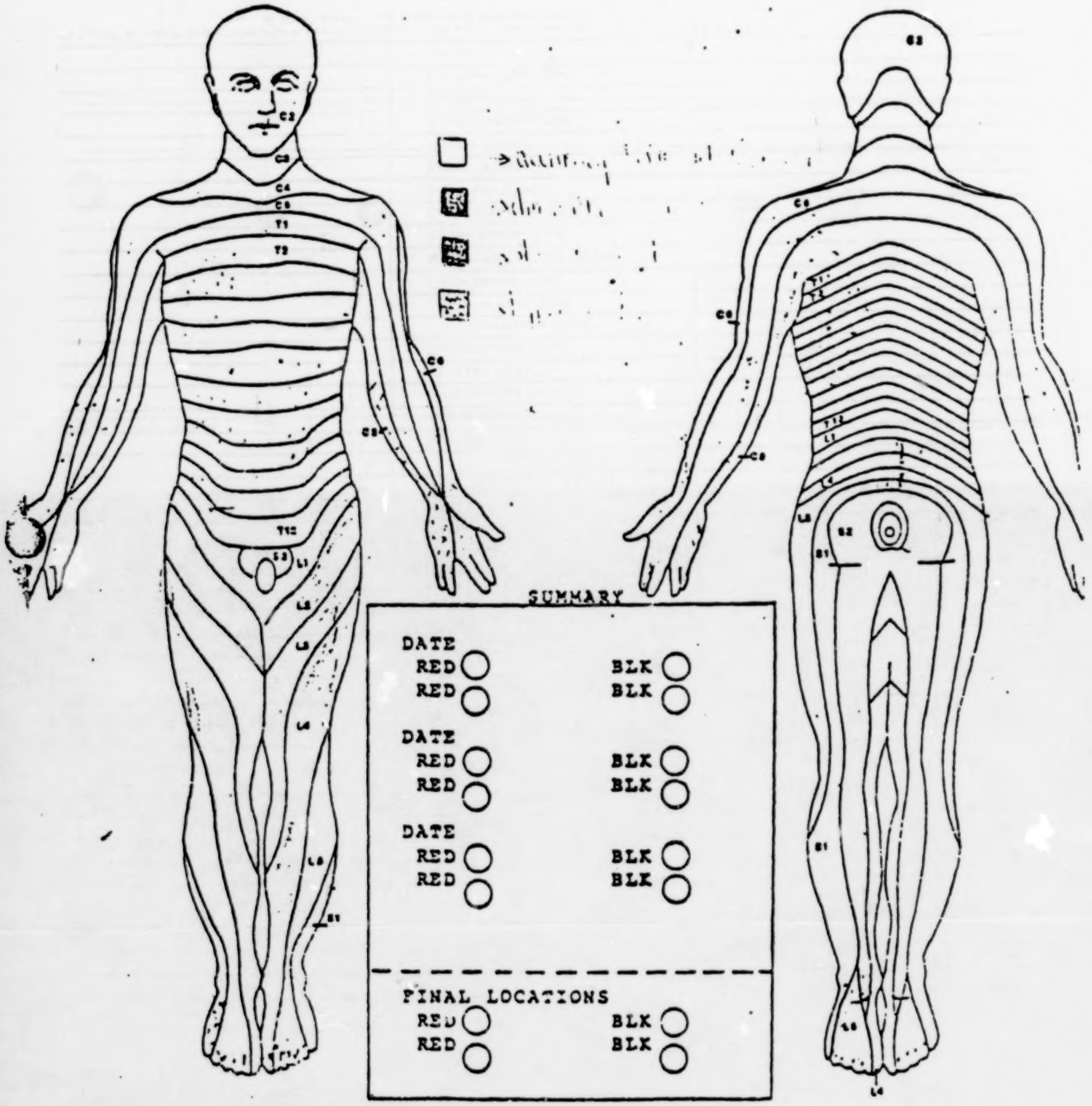
REGISTER NO

WARD NO

PROGRESS NOTES
STANDARD FORM 509 (Rev. 11-77)
Prescribed by GSA/ICMR
FPMR (41 CFR) 101-11.4
509-110

PATIENT'S AT-HOME ELECTRODE PLACEMENT CHART - STAODYN TNS

NAME _____



SUMMARY

DATE
RED ○ BLK ○
RED ○ BLK ○

DATE
RED ○ BLK ○
RED ○ BLK ○

DATE
RED ○ BLK ○
RED ○ BLK ○

FINAL LOCATIONS
RED ○ BLK ○
RED ○ BLK ○

INSTRUCTIONS _____

_____

Signed _____

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Standard Form 88a
Revised August 1954
Bureau of the Budget
Circular A-62 (Rev.)

CLINICAL RECORD | MUSCLE AND/OR NERVE EVALUATION—MANUAL AND ELECTRICAL: UPPER EXTREMITY

DIAGNOSIS AND BRIEF CLINICAL HISTORY

LEFT	← (Insert type of test given) →	RIGHT
	EXAMINER'S INITIALS	
	DATE	
	SPINAL ACCESSORY NERVE	
	Sternocleido-mastoid —Stern. C2–3	
	Sternocleido-mastoid —Clav. C2–3	
	Trapezius—Upper C2–4	
	—Middle C2–4	
	—Lower C2–4	
	DORSAL SCAPULAR NERVE	
	Rhomboids C4–5	
	LONG THORACIC NERVE	
	Serratus Anterior C5–7	
	THORACO DORSAL NERVE	
	Latissimus Dorsi C5–8	
	UPPER SUBSCAPULAR NERVE	
	Subscapularis C5–6	
	LOWER SUBSCAPULAR NERVE	
3	Teres Major C5–7	
	ANT. THORACIC NERVE	
	Pect. Maj.—Clav. C5–7	
	—Stern. C5–8, T1	
	SUPRASCAPULAR NERVE	
3	Supraspinatus C4–6	
2	Infraspinatus C4–5	
	AXILLARY NERVE	
	Deltoid—Ant. C5–6	
	—Middle C5–6	
	—Post. C5–6	
3	Teres Minor C5–6	
	MUSCULOCUTANEOUS NERVE	
	Biceps Brachii C5–6	
	Coracobrachialis C5–6	
	Brachialis C5–6	
	RADIAL NERVE	
	Triceps C5–8, T1	
	Brachioradialis C5–6	
	Supinator C5	
	Ext. Carp. Rad. C5–7	
	Ext. Carp. Uln. C7	

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first, middle; grade; date; hospital or medical facility)

REGISTER NO. | WARD NO.

LEFT	(Insert type of test given)	RIGHT
	EXAMINER'S INITIALS	
	DATE	
	Ext. Dig. Quinti C7	
	Ext. Ind. Prop. C7	
	Ext. Dig. Com —1 C5	
	—2	
	—3	
	—4	
	Ext. Pol. Long C7	
	Ext. Pol. Brev C7	
	Abd. Pol. Long C7	
	MEDIAN NERVE	
	Pronator Teres C6	
	Palmaris Long. C6–8, T	
	Flex. Carpi Rad. C6	
	Flex. Dig. Sub.—1 C7–8, T1	
	—2	
	—3	
	—4	
	Flex. Dig. Prof —1 C8, T1	
	—2	
	Flex. Pol. Long. C8, T1	
	Flex. Pol. Brev. C8–T	
	Abd. Pol. Brev. C6–7	
	Opp. Pollicis C6–8 T1	
	Lumbricales—1 C7–8	
	—2	
	ULNAR NERVE	
	Flex. Carpi Uln. C8	
	Flex. Dig. Prof —3 C8, T1	
	—4	
	Add. Pollicis C8	
	Abd. Dig. Quinti C8, T1	
	Opp. Dig. Quinti C8, T1	
	Flex. Dig. Quinti C8, T1	
	Interossei (Dor.) —1 C8	
	—2	
	—3	
	—4	
	(Palm.) —1	
	—2	
	—3	
	Lumbricales—3 C8	
	—4	

Key to Manual Muscle Evaluation.

Key to Electrical Evaluation:
(Insert key used locally)

SIGNATURE OF PHYSICIAN

DATE

MEDICAL RECORD

MUSCLE FUNCTION BY NERVE DISTRIBUTION: Trunk and Lower Extremity

PROBLEM AND BRIEF CLINICAL HISTORY

KEY TO MANUAL MUSCLE EVALUATION

100%	5	N	Normal:	Complete range of motion against gravity with full resistance
75%	4	G	Good:	Complete range of motion against gravity with some resistance
50%	3	F	Fair	Complete range of motion against gravity
25%	2	P	Poor	Complete range of motion with gravity eliminated
10%	1	T	Trace	Evidence of contractility but no joint motion
0%	0	0	Zero:	No evidence of contractility

DATE →									COMMENTS
INDICATE SIDE TESTED →									
Erector Spinae	T1-12, S1-3								
Rectus Abd	T5-11								
Obl Ext Abd	T7-12, L1								
Obl Int Abd	T7-12, L1								
Quad Lumborum	T12, L1-3								
Iliopsoas	L1-4								
INF. GLUTEAL NERVE									
Gluteus Max.	L5, S1-2								
SUP. GLUTEAL NERVE									
Glut Med	L4-5, S1								
Tens Fas Lat	L4-5, S1								
Int. Rotation									
Ext. Rotation									
FEMORAL NERVE									
Sartorius	L2-3								
Quadriceps	L2-4								
OBTURATOR NERVE									
Hip Adductors	L2-4								
SCIATIC NERVE									
Biceps Fem	L5, S1-3								
Semiten	L4-5, S1-2								
Semimem	L4 5, S1-2								
POST TIBIAL NERVE									
Gastrocnemius	S1-2								
Soleus	L5, S1-2								
Tib Post	L5, S1								
Flex Dig Long	L5, S1								
Flex Dig Brev	L5, S1								
Flex Hal Long	L5, S1-2								
Flex Hal Brev	L5, S1								
Abductor Hallucis	L5, S1								
Interossei	S1-2								
Lumbricales	S1-2								
COM. PERONEAL NERVE									
Tibialis Ant	L4-5, S1								
Ext. Dig. Long	L4-5, S1								
Ext. Dig. Brev	L4-5, S1								
Ext. Hal. Long	L4-5, S1								
Peroneus Long & Brev	L4-5, S1								
Peroneus Tert	L4-5, S1								

SIGNATURE DATE

PATIENT'S IDENTIFICATION *For typed or written entries give: Name—last, first, middle, grade, SSAN, rank, rate, hospital or medical facility)*

REGISTER NO WARD NO

MUSCLE FUNCTION BY NERVE DISTRIBUTION
Trunk and Lower Extremity
Standard Form 523 (Rev [illegible])
Prescribed by GSA/ICRC (FPMR 41 CFR [illegible])
528-104

CLINICAL RECORD

SELF-CARE ACTIVITIES—FUNCTIONAL EVALUATION

TYPE OF DISABILITY

PRECAUTIONS

HANDEDNESS ☐ LEFT ☐ RIGHT	ORTHOPEDIC APPLIANCE(S)	OCCUPATION (*Prehospitalization*)	AGE

INITIAL TEST	
THERAPIST INITIALS	THERAPIST INITIALS
DATE INITIAL TEST COMPLETED	

SCORING KEY

(Scores indicate skill accomplished within a reasonable time)

0—Cannot be accomplished.
1—Can be accomplished with human aid.
2—Can be accomplished with adaptation of environment (low bed, special toilet seat, hand rails, ramps, etc.).
3—Can be accomplished with use of mechanical aids (splints, braces, prostheses, crutches, wheelchair, etc.).
4—Can be accomplished without aids, adaptation or assistance.

ACTIVITIES	SCORE (*RED X—indicates initial test; DATE—indicates change in condition*)				
PART I—EATING	0	1	2	3	4
1. EAT WITH FINGERS					
2. DRINK FROM CUP					
3. DRINK FROM GLASS					
4. EAT WITH SPOON					
5. CUT WITH KNIFE					
6. CUT WITH FORK					
7. EAT WITH FORK					
8. MAINTAIN SUITABLE POSTURE					
9.					
10.					
11.					
PART II—COMMUNICATION					
12. WRITE					
13. TYPE					
14. USE TELEPHONE					
15. OPEN ENVELOPE					
16. REMOVE LETTER FROM ENVELOPE					
17. PLACE LETTER IN ENVELOPE AND SEAL					
18.					
19.					
20.					
PART III—HYGIENE					
21. TURN ON FAUCET					
22. TURN OFF FAUCET					
23. SHAVE					
24. MAKE UP					
25. WASH HANDS					
26. WASH FACE					
27. BRUSH OR COMB HAIR					
28. SHAMPOO HAIR					
29. BRUSH TEETH					

SIGNATURE OF CHIEF, PHYSICAL MEDICINE AND REHABILITATION	DATE

PATIENT'S LAST NAME—FIRST NAME—MIDDLE NAME	REGISTER NO.	WARD NO.

NAME OF HOSPITAL OR OTHER MEDICAL FACILITY	SELF-CARE ACTIVITIES—FUNCTIONAL EVALUATION

VA FORM 10-2617 SUPERSEDES VA FORM 10-2553 APR 1948, WHICH WILL NOT BE USED

condition)

PART III—HYGIENE (Continued)	3	1		3	4
30. GET INTO BATH					
31. GET OUT OF BATH					
32. GET INTO SHOWER					
33. GET OUT OF SHOWER					
34. BATHE SELF					
35. USE URINAL					
36. USE BEDPAN					
37. GET ON TOILET					
38. ADJUST CLOTHING					
39. GET OFF TOILET					
40. READJUST CLOTHING					
41. TRIM FINGERNAILS					
42. CLEAN FINGERNAILS					
43. TRIM TOENAILS					
44. CLEAN TOENAILS					
45.					
46.					
47.					
PART IV—DRESSING					
48. PUT ON BRACES OR PROSTHESES					
49. REMOVE BRACES OR PROSTHESES					
50. PUT ON TROUSERS OR SKIRT					
51. REMOVE TROUSERS OR SKIRT					
52. PUT ON PULLOVER GARMENT					
53. REMOVE PULLOVER GARMENT					
54. PUT ON SHIRT OR BLOUSE					
55. REMOVE SHIRT OR BLOUSE					
56. BUTTON BUTTONS					
57. UNBUTTON BUTTONS					
58. ZIP ZIPPER					
59. UNZIP ZIPPER					
60. OPERATE HOOKS AND EYES					
61. SNAP SNAPS					
62. UNSNAP SNAPS					
63. PUT ON TIE SHOE OR BUCKLE SHOE					
64. REMOVE TIE SHOE OR BUCKLE SHOE					
65. TIE BOW					
66. UNTIE BOW					
67. BUCKLE BUCKLE					
68. UNBUCKLE BUCKLE					
69. PUT ON SLIPPERS OR LOAFERS					
70. REMOVE SLIPPERS OR LOAFERS					
71. PUT ON HOSE					
72. REMOVE HOSE					
73. PUT ON NECKTIE					
74. REMOVE NECKTIE					
75. PUT OBJECT IN POCKET					
76. REMOVE OBJECT FROM POCKET					
77.					
78.					
79.					
PART V—LOCOMOTION					
80. MOVE FROM PLACE TO PLACE IN BED					
81. TURN OVER IN BED					

10—60073-1

ACTIVITIES	SCORE (RED X—indicates initial test; DATE—indicates change in condition)				
PART V—LOCOMOTION (Continued)	0	1	2	3	4
82. SIT UP IN BED					
83. GET OUT OF BED TO CHAIR					
84. GET INTO BED FROM CHAIR					
85. GET OUT OF BED TO STANDING					
86. GET INTO BED FROM STANDING					
87. PROPEL WHEELCHAIR					
88. CHAIR TO STANDING					
89. STANDING TO CHAIR					
90. STAND					
91. STAND AND REMAIN IN ERECT POSITION					
92. WALK ON SMOOTH SURFACE— FT.					
93. WALK BACKWARD					
94. WALK SIDEWARD TO LEFT					
95. WALK SIDEWARD TO RIGHT					
96. WALK ON ROUGH SURFACES INCLUDING RUGS					
97. WALK UP RAMP— FT.					
98. WALK DOWN RAMP— FT.					
99. GO UP FLIGHT STAIRS					
100. GO DOWN FLIGHT STAIRS					
101. GO DOWN CURB					
102. GO UP CURB					
103. GO DOWN CURB—CROSS STREET—GO UP CURB					
104. OPEN DOOR—GO THROUGH—CLOSE DOOR					
105. GET DOWN TO FLOOR					
106. GET UP FROM FLOOR					
107. MOVE ON FLOOR IN OTHER THAN UPRIGHT POSITION					
108. GO UP BUS STEPS					
109. GO DOWN BUS STEPS					
110. GET INTO AUTOMOBILE					
111. GET OUT OF AUTOMOBILE					
112. DRIVE AUTOMOBILE					
113. WALK CARRYING TRAY WITH DISHES					
114. PLACE TRAY ON TABLE					
115. GET INTO CHURCH PEW					
116. GET OUT OF CHURCH PEW					
117. GET INTO THEATER SEAT					
118. GET OUT OF THEATER SEAT					
119.					
120.					
121.					
PART VI—HOUSEHOLD					
122. OPEN DRAWERS					
123. CLOSE DRAWERS					
124. LOCK DOOR					
125. UNLOCK DOOR					
126. GET INTO CHAIR AT TABLE					
127. GET OUT OF CHAIR AT TABLE					
128. GET INTO UPHOLSTERED CHAIR					
129. GET OUT OF UPHOLSTERED CHAIR					
130. MAKE BED					
131. OPEN WINDOW					
132. CLOSE WINDOW					
133.					
134					

DECLARATION OF DORIS J. WILSON
(CAPTION OMITTED)

I, Doris J. Wilson, declare and state as follows:

1. I am the widow of Stanley Wilson, who died on December 12, 1980 from pancreatic cancer. My husband, Stanley, served in the United States Navy, mainly in the Pacific Theatre, from June 22, 1943 to June 9, 1947. Several of the Navy ships to which Stanley was assigned after World War II were involved in atomic testing. On one of Stanley's ships that was contaminated with radiation from the blasts, several men lost their hair and others became nauseated. The officers and crew were troubled by their inability to decontaminate the ship.

2. In 1979, after Stanley was diagnosed as having cancer, I contacted a Sacramento, California, attorney to discuss a possible claim for V.A. Disability Compensation. He told me that he could not represent Stanley before the V.A. because of the $10.00 attorney's fee statute. He also said that because of the $10.00 limitation he doubted that I could find *any lawyer* who would take a V.A. Disability Compensation case. Because of this conversation, I gave up trying to find a lawyer to prosecute Stanely's potential Disability Compensation claim and Stanley never filed a claim.

3. As a result of his servicetime exposure to radiation, Stanley died of cancer on December 12, 1980. On December 17, 1981, I filed a V.A. Death Compensation claim with the San Francisco Regional V.A. Office. On January 14, 1982, my claim was denied by the San Francisco office as not service connected. On January 28, 1982, I submitted a Notice of Disagreement on a "Statement in Support of Claim" form, a true copy of which is attached hereto as Exhibit "A" and incorporated by this reference. In March 1982, I filed a Request for Extension to File Appeal so that I could collect more evidence, not knowing that I had up until a year from the original decision to file my appeal. My service representative, the Veterans of Foreign Wars, did not help me in searching for records of my husband's exposure to radiation and I found it to be a very difficult and time-

consuming process. I still have not been able to obtain many of Stanley's basic service records or obtain documentation of the particulars of my late husband's service-connected radiation exposure.

4. On May 5, 1982 I received a letter from the V.A. acknowledging my request for a hearing and attempting to persuade me to waive my right to a hearing. A true copy of this letter is attached hereto as Exhibit "B" and incorporated by this reference. On June 23, 1982, I received a letter from the San Francisco Office of the V.A. stating that I must submit any additional evidence to the San Francisco Office by January 22, 1983. I wrote a letter to the San Francisco V.A. Office on January 12, 1983, asking for more time to collect evidence. On January 18, 1983, two days before my time to file additional evidence with the San Francisco Office expired, my Veterans of Foreign Wars service office advised me to simply allow the time to file additional evidence to expire, suggesting that, if I lost, I could refile with additional evidence. I still desired an extension so that I could collect additional evidence of my husband's exposure to radiation. However, on February 15, 1983, my appeal was denied by the BVA.

5. At this point I am about ready to give up. The Veterans of Foreign Wars have not helped me at all in obtaining evidence. The one time that I was supposed to have a hearing before the San Francisco V.A. office my service officer did not meet with me one [sic] until minutes before the hearing was to be held. I had driven in from Carmichael, California for the hearing. The service officer spent several minutes frantically scrambling to come up with some evidence. Then, at the last second, he decided to waive my right to a hearing.

6. I have been very frustrated and discouraged by the adversarial nature of the V.A. adjudication system and by the total lack of help that I have received from the Veterans of Foreign Wars in obtaining evidence. I desire to hire a lawyer to represent me but cannot do so because of the $10 fee limitation.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 15th day of July, 1983 at Carmichael, California.

/s/ Doris Wilson
DORIS WILSON

[VOLUME I]

DEPOSITION OF WESLEY J. HAWKE
OCTOBER 24, 1983
(CAPTION OMITTED)

---

[2] * * * * *

EXAMINATION BY MR. ERSPAMER

MR. ERSPAMER: Q. Please state your full name for the record.

A. Wesley J. Hawke.

Q. What is your position with the Veterans [3] Administration?

A. I am a rating specialist. They call them veterans claims examiners.

Q. Are you in basically the same position as—

A. Tom Jacobson? Yes.

* * * * *

[4] Q. Okay. What is involved in the evaluation of disability claims?

A. Well, the first step is acquiring the evidence, requesting—if it's a service connected claim, requesting service medical records, then reviewing those service medical records; requesting an appropriate VA examination; after receipt of the VA examination, reading and evaluating the medical report by the doctor at the VA medical facility, and making an appropriate evaluation, according to our rating schedule, and then putting out a rating sheet.

* * * * *

[17] Q. Did you personally review the medical records of Mr. Maxwell in connection with the adjudication of this claim?

MR. STOLL: I direct the witness not to answer that question.

MR. ERSPAMER: Q. I direct your attention to this document that's dated June 13th, 1983, which you apparently received from Mr. Christian.

First of all, do you know Mr. Christian?

A. No.

Q. You never met him?
A. No.
Q. Directing your attention more particularly to the sentence that refers to reports filed by internees, do you see that reference there in the third paragraph?
A. Yes.
Q. Did you ever see any reports filed by internees yourself?
A. No.
Q. Did you ever see the camp rosters which are referred to in the first paragraph?
A. No.
Q. Did you personally speak to Mr. Christian with regard to the subject matter of this particular document?
A. No.
[18] Q. Did you speak to anyone with regard to the subject of the location of the Nagoya Camp 6?
MR. STOLL: I direct the witness not to answer that question.
MR. ERSPAMER: Certify that one, please.
Q. Did you personally review any of the medical reports with regard to Mr. Maxwell?
MR. STOLL: I direct the witness not to answer that question.

* * * * *

[19] Q. Did you receive any lectures in the POW Public Law 97-37, dated August 14th, 1981, called the Former Prisoners of War Benefits Act of 1981?
A. We received explanatory briefings on it, yes.
Q. What is your understanding of what Public Law 97-37 provides?
A. It basically provides the basis—the presumptive provisions for diseases and illnesses that all appeared—that POW's underwent and how we're able to assume, unless there are intervening causes, that these particular diseases are—if the veteran comes down with them, they're service connected.
Q. What are the presumptive conditions that you're aware of that are included?

A. There's about ten diseases or illnesses. One is malaria. I believe pellagra, psychosis, the anxiety neuroses, avitaminosis, and a couple of other ones that deal with malnutrition.

* * * * *

[20] Q. And the diseases you were just referring to are the ones stated here in Section 4?
A. Right.
Q. What is that one, helminthiasis?
A. Yes.
Q. Do you know what that is?
A. That's something to do, I believe, with malnutrition, some vitamin or something like that, a deficiency. But I haven't looked it up specifically.
Q. Chronic dysentery is another one. Those are the ones you are calling to mind—
A. Yes, right.
Q. —a few moments ago?
A. Right.
Q. Of those diseases listed there, which ones were involved in the claim of Albert Maxwell?
A. Mr. Maxwell is service connected for beriberi, post-traumatic stress disorder, optic atrophy, residuals of malaria. That's all.
Q. Those are conditions he is already service connected for; correct?
A. Correct.
[21] Q. What are the additional diseases listed there for which he has advanced claims, service connected death and disability compensation claims?
A. The main one is the multiple myeloma.
Q. What about gastrointestinal problems?
A. Okay. He also wanted to claim service connection for GI problems, hemorrhoids, arthritis, pain in the abdomen, varicose veins, and cardiovascular disease.
Q. He also claimed right upper quadrant pain as part of his claim, pain in the abdomen?
A. Yes, he did claim pain in the abdomen.
Q. In that connection are you aware of a study done by John P. Kirschner on liver disease among POW's—

A. No.

Q. —which identifies a parasite as a cause of right upper quadrant pain in POW's?

A. No, I'm not familiar with that.

Q. Are you familiar with any medical studies done of former POW's of medical problems experienced by former POW's?

A. I have read several articles concerning POW's around the various ailments that they have come down with.

Q. What are some of the articles that you have read?

A. I can't tell you that. I would have to go back and look at my POW book.

Q. You have a folder back in the office that deals specially with POW issues?

A. Well, I have a folder that I maintain for my own personal use to—whenever I get a POW claim, I get the [22] folder out and make sure I don't miss anything.

Q. What is included in your folder?

A. The current instructions concerning development of POW claims, copies of articles that have been passed along to us on POW claims, the appropriate letters that we send out to POW's, et cetera.

* * * * *

[27] A. Tropical diseases. The following diseases may be considered for service connection as a result of tropical service, although not otherwise established, as incurred in service if manifested to a compensable degree during the applicable time period under 3.307 or 3.308.

Q. You're reading from 3.309(b)?

A. Correct.

Q. Okay.

A. That gives a complete list of the tropical diseases.

Q. And it includes dysentery and cholera, malaria and various other ones?

A. Amoebiosis, black water fever, cholera —this one I never heard of. Dracontiasis, d-r-a-c-o-n-t-i-a-s-i-s.

Q. And the other ones listed there. You don't need to go through all of them.

Under Subsection C there are some specific prisoner of war diseases mentioned, and it basically includes the same group as mentioned in Public Law 97-37?

A. Yes. This Public Law basically added the psychosis and anxiety elements.

Q. I see. Now, in connection with your adjudication of the claim of Albert Maxwell, did you ever have occasion to speak to Mr. Leach?

A. I don't know any Mr. Leach.

Q. Do you ever recall reviewing an affidavit by a Senior Master Sergeant Albert L. Leach, who claimed to be present with Albert Maxwell in the Bataan Death March and the Infamous Hell Ships to the island of Japan and mentioning the [28] fact that he was incarcerated in Camp No. 6 in Nagoya, Japan with Albert Maxwell?

A. If it's in the claim file, I did.

Q. I believe I can represent to you that it's in his claim file. But you do not recall ever speaking to Mr. Leach?

A. No.

Q. Were you aware of the fact that Mr. Leach resides in Novato, California?

A. I have no idea.

Q. What is your usual practice when you get what are called, I guess, buddy statements with regard to a claim? Do you usually follow up on them and contact the veteran?

A. No, we don't follow up on them.

Q. What about if you get a veteran to submit the names of several of his buddies who were present at a particular occasion upon which he alleges resulted in a service connected injury, do you follow up on the names, try to interview the people involved?

A. No.

Q. Have you ever met Mr. Maxwell?

A. No.

* * * * *

[39] Q. And you have had occasion in making ratings to deny a claim for failure of proof?

A. Yes.

Q. That's a fairly frequent basis for denying a claim, is it not, failure of proof?

A. Yes.

* * * * *

[40] Q. Well, what is your understanding as to the catalog of reasons why those claims are denied?

A. Mostly for insufficient evidence to relate the claimed exposure to radiation to whatever disability the veteran is claiming.

Q. What is your standard workup, if you have one, in atomic radiation claims? Do you have certain things you do beyond the normal getting of the service records, getting the service medical records and perhaps ordering a physical exam? Are there any other things you do to develop an atomic radiation claim?

A. Well, we request service medical records. We request the appropriate form for listing any kind of exposure—I think it's form 1137—from the service department—not the service department, the Records Personnel Center. Usually if they've been exposed and they have the dosimeter readings, again that's on a form 1137, and we always request those.

Then if that's insufficient, then we request assistance from CO to coordinate with the Department of Defense. They have an organization—

[41] Q. Defense Nuclear Agency?

A. Yes. Then they request the information concerning atomic tests, as to the—what tests the particular veteran was on. If they don't have their dosimeter reading, they make a judgment as to the amount of radiation that he might—he or she might have been exposed to.

* * * * *

Q. Do you make any effort to assess the exposure from ingestion and inhalation?

A. No.

Q. Now, in your personal experience have you found that requests for hearings are fairly rare in the local [42] experience? Most claims, a request for a hearing is not asked for or made?

A. That's true.

* * * * *

[43] Q. Would it surprise you to learn that claimants who request hearings prevail twice as often as claimants who do not request hearings?

A. Yes.

* * * * *

VOLUME II

DEPOSITION OF WESLEY J. HAWKE
NOVEMBER 3, 1983
(CAPTION OMITTED)

[56] * * * * *

Q. Now, getting back to my quesiton, what development did you do in connection with the claim for multiple myeloma?

A. Well, the basic development that I made was making up the letter that would go to Central Office to verify or not verify the veteran's claim as to the location of his POW camp and whether or not he was—whether he came in contact, as he claimed, or went to the two cities that were bombed by the atomic blast.

Q. Can you indicate where in the file, the main file, that letter is? It is a letter, is it not, to the—is it the army personnel committee review or something to that effect?

A. Well, there was one other thing we did do to develop that I forgot about.

Q. Okay. Why don't you mention that first.

A. Okay. We did send off to the National Personnel Records Center to find out whether there was any kind of POW debrief on this person, which we didn't.

Q. Which you didn't find?

A. They could find no POW debrief on him.

Q. Weren't all the POW's debriefed?

A. I cannot answer that. I assume they were. However, the records for many of them—I don't know what became of them.

Q. Have you had difficulty in the past obtaining debriefing for other POW's?

A. Yes

[57] Q. Approximately how many POW cases have you attempted to find the debriefing records for?

A. I do not know the answer to that.

Q. Well, more than one, obviously?

A. Yes.

Q. More than five?

A. After that, I can't tell.

Q. But more than five?

A. I believe so, yes.

Q. Have you ever been able to get any debriefing records?

A. Personally, no. I understand that some of the other board members have.

Q. Did you attempt to get debriefing records of other POW's who were interred at Nagoya Camp 6 along with Mr. Maxwell?

A. No. We had no reason to request that particular information.

Q. Well, if the debriefing records of fellow prisoners in Nagoya Camp 6 show that the internees of Camp 6 were sent off to Hiroshima, that would be a fact you would consider relevant?

A. Yes, it would. That was one of the reasons why we wrote this letter to CO on the location of his Prisoner of War camp and whether or not he was exposed to radiation. The letter we sent off to CO was mailed—or did on May 16th, 1983. And I am referring to my list of notes.

Do you want me to look in the file for the specific [58] location of that?

Q. Yes, why don't you. Then you can just identify it for the record.

A. There it is there.

Q. You are referring to a letter dated May 16th, 1983, to the field director, western region?

A. That's correct.

Q. Isn't this the request for an advisory opinion?

A. That's correct. It includes trying to get information on the location of his Prisoner of War camp and whether or not he had been exposed to radiation.

Q. Where in there are you requesting debriefing records?

A. I am not requesting debriefing records. I am asking for the facts concerning what—we gave the facts that the veteran gave us, and we indicated that we were requesting information from them to either substantiate his claim or not to, and leaving it up to the people in Central Office to obtain the necessary information to either substantiate or deny his claim.

Q. So you thought that the procedure they would take in response to your letter would be to request copies of the debriefing records?

A. Either debriefing records or the composite of POW information in Washington someplace.

Q. So you never personally sent a request to National Personnel Records Center for debriefing records for Mr. Maxwell?

[59] A. Personally?

Q. Directly.

A. Well, yes, we did.

Q. Okay. That's what I was referring to. That's the document I was asking you to find in the file.

* * * * *

Q. Let's see. First let's start with the request. It says, "Please furnish POW debriefing records for this vet. Also send any SMR's." What are SMR's?

A. Service medical records.

Q. Okay. "Not previously furnished." Then it says, "Thanks, EA"?

A. That I don't understand.

Q. A personal description, including marks and scars, height, complexion, color of hair and eyes?

A. They were asking for a personal description of the veteran.

[60] Q. And verification of POW status from 4/1/42 to 10/30/45 and clinical records for repatriation.

Is that a computer-generated request?

A. Yes, it is.

Q. And initiated by you?

A. Whether it was me or somebody else I do not know.

Q. It could have been by a clerk, I assume?

A. Well, the clerk is the one who put it into the machine, yes.

Q. I see. And then handwritten on Paragraph 30, which is imprinted "Endorsement verification by service department," there are some handwritten notations that say POW, May 7, '43 to September—excuse me. '45. No debriefing, slash, clinical records found. Personal description not available.

Is that the report you got back from the National Personnel Records Center?

A. That's correct.

Q. And that's the center that was affected by the fire?

A. That's correct.

Q. So it's possible that his debriefing records, if they existed, could have been destroyed in that fire?

A. That's possible.

* * * * *

[61] MR. ERSPAMER: Q. Does that indicate to you that it's possible that those questions were destroyed by the fire?

A. That's a possibility. If there were records available, they could have been destroyed by the fire.

Q. And that, for the record, is part of Exhibit 187.

Did you attempt to contact the National Archives Modern Military Records Section to attempt to discern whether they had any debriefing records on Mr. Maxwell?

A. No, I did not.

Q. Did you attempt to contact them on any other subject in connection with this claim?

A. No.

Q. Other than sending the letter to the Central Office—which I assume was that request for an advisory opinion we already looked at?

A. That's correct.

Q. It was May—

A. May 12th, I believe.

Q. The May 12th request for an advisory opinion?

A. Wait. That's not correct.

Q. Let's find it so the record is clear. And again for the record, we'll be referring to the same exhibit throughout the morning.

A. May 16th.

Q. Okay. Apart from that May 16th, 1983 request for an advisory opinion to the Central Office and the request to the National Personnel Records Center which we have just gone [62] over, did you do anything else to develop Mr. Maxwell's claim for multiple myeloma?

A. No.

Q. Do you have a standard protocol or instructions with regard to development of POW claims?

A. What do you mean by standard protocol?

Q. Well, do you have a special set of instructions for development of POW claims, as opposed to all the other types of claims you get?

A. No.

Q. And did you receive instructions as to how particularly to develop these types of claims as opposed to other types of claims when you receive your training to be the POW rating board member?

A. No. They're just standard development procedures that we have for all claims, trying to ensure that we get complete medical records and service records.

* * * * *

[63] Q. Do you recall approximately how much time you spent on the Maxwell claim?

A. About 24 hours.

* * * * *

[68] Q. And you have seen Mr. Maxwell, have you not?

A. No, I have not.

Q. You have never met him?

A. No.

* * * * *

[73] Q. Moving on to Mr. Maxwell's certificate of disability for discharge, dated 10 December 1947, it lists, does it not, under A—again this is signed by Mr. Spaulding, I believe. No, Mr. Erpelding, E-r-p-e-l-d-i-n-g. It's a document entitled certificate of disability for discharge. It says, "After careful consideration of all information [74] obtainable and a critical examination, we find this individual unfit for military service because of" —and they list the following: A, beriberi, residuals of manifested by numbness of fingertips, diminished vision left eye 20/200, fatiguability, nervousness and inability to concentrate. B, malaria, old, type undetermined. Blood smear negative here, positive at Fort Worden, W-o-r-d-e-n. Regimental dispensary, Port Townsend, Washington. Contracted SW Pacific. Incapacitates because of chronicity and severity of conditions.

Again that shows his diminished vision, does it not?

A. Correct.

Q. In a period in service?

A. Correct.

Q. And indeed, part of the basis for his discharge from service as unfit for military service was the fact of his eye condition, was it not?

A. That was one of the factors, yes.

* * * * *

[81] Q. It includes several other disability claims that [82] are not included in your rating decision, does it not? Why don't you just list for the record the ones that are not included in your rating decision that you referred to in your earlier testimony. Again I'm referring to Exhibit D to the Complaint.

A. Well, this VA form 41-38, dated 12/2/82, includes—what are not in our considerations are muscle spasms, Charley horses in the feet, hands, calves, thighs, chest and back. And it lists two medications that he takes. He includes chronic headaches and insomnia.

It should be noted that chronic headaches and insomnia could be symptoms of his nervous condition.

Q. Which has already been rated at 30 percent, right, the post-traumatic stress?

A. That's correct.

Q. Okay.

A. Then it mentions the optic atrophy and diminishing eyesight, with phlegm on the eyelids every morning. And it shows a medication that he takes for it. He claims he was operated on in 1947. He claims edema in the hands, feet, calves and stomach, and he lists two medications that he takes.

He claims arthritis in the lower back and shoulders.

Q. Arthritis is listed, is it not?

A. That's correct, arthritis is listed.

Q. In your rating, okay.

A. He claims extreme rashes, itching and swelling. I don't believe that is listed. He claims hey fever and sinus [83] problems, which are not one of the considerations. He also mentions malaria, for which he takes two medications.

Q. It's continued on the next page. Varicose veins is in the rating; correct?

A. That's correct.

* * * * *

MR. ERSPAMER: Q. Have you been able to determine in that break what the claim that that rating decision relates to is?

A. Okay. Based on some assumptions, it started—the initial part started when he started claiming his multiple myeloma secondary to exposure to atomic radiation. Then there is a big, long gap. And I cannot fathom why there is such a big, long gap between the time—

Q. That was in March of 1982 that you just pointed out here—

A. Correct.

* * * * *

[85] A. As far as we know, we never received that.

Q. I understand. But these particular claims for disability, such as the optic atrophy, were never adjudicated by you?

A. That's correct. We don't adjudicate claims unless the veteran raises the issue.

Q. I think the veteran has raised the issue. It's a question of what happened with this 12/2/82 document.

I take it you don't have in your file Exhibit E to the Complaint either. I didn't see it anywhere. Let me show it to you. It's another statement in support of the claim dated 1/4/83, where Mr. Maxwell said he has a pending claim, and he was scheduled for a personal hearing at the Salt Lake City, Utah office on March 17, and he reports that his claim may have been inadvertently delayed by improper action taken by the DAV.

"My statement of 12/2/82 was with the"—

A. Intent to continue his appeal.

Q. Yes. So he indicates there that he's referring to Exhibit D we already looked at, the statement of 12/2/82; right?

A. I can only assume that that's what he's referring to.

* * * * *

[89] Q. Did you ever make any effort to determine how many road miles it was from Takaoka to Hiroshima?

A. No.

Q. Have you ever been in that section of Japan?

A. I have never been to Takaoka or to Hiroshima. I have been to other parts—Osaka and places in between there and Tokyo.

Q. You have never been on the most direct route from—first of all, have you driven the most direct route from Takaoka to Hiroshima?

A. I never did any driving in Japan at all. I took either the train or the bus. And using current maps to try to decide the road mileage now would not give you the correct road mileage that was in effect in 1945.

Q. But you made no effort to consult maps extant in 1945 or now—

A. No.

Q. —to determine the road mileage?

A. No.

Q. You made no effort to consult any source to determine the amount of time it would take to travel from Takaoka toHiroshima?

A. For exact timing, no.

* * * * *

[90] Q. But you were not present at the hearing?

A. No.

Q. So you had no opportunity to observe Mr. Maxwell's demeanor?

A. No.

Q. You had no opportunity to perceive Mr. Maxwell's conditions personally, exactly what he looked like and so on?

A. No.

Q. You had no opportunity to see Mr. Maxwell's upper right quadrant fullness?

A. No.

Q. Did you ever see a picture of Mr. Maxwell's upper right quadrant fullness?

A. No.

Q. Handing you what is marked as Plaintiffs' Exhibit 27, which is a copy of a photo—admittedly it's not the best copy in the world—you never saw this picture of Mr. Maxwell?

A. No, I did not.

* * * * *

[95] Q. Do you have any special training in how to read medical records that you received?

A. No.

* * * * *

[96] Q. In this case you can personally confirm that the doctor on the rating board reviewed all these records?

A. I did not watch him review all the records, no.

Q. Did he ever tell you that he reviewed all the records?

A. I asked him to look through the file, and he said he did.

* * * * *

[97] Q. And you assume that he had reviewed the records prior to his signing the rating?

A. Yes.

* * * * *

Q. Well, I take it from your previous testimony that he did not report back to you on any of the issues based upon his review of the medical records. Isn't that correct?

A. Okay. He did make a comment on how much the beriberi was evaluated at, the residuals of the beriberi.

Q. And was that after he reviewed the medical records?

A. That's correct.

* * * * *

[102] Q. Okay. Did you ever investigate, in Paragraph 4, the, quote, "probable explanation that his problems were due to some sort of amoebic parasitic bug that the GI's picked up in the South Sea Islands"?

A. No, I did not.

Q. Did you ever attempt to explore the cause of Mr. Maxwell's upper right quadrant fullness?

A. Personally, no.

* * * * *

[103] Q. Now, to your knowledge, did anyone else in the adjudication of Mr. Maxwell's 1982 and 1983 claims investigate the cause of the upper right quadrant fulness?

A. No.

Q. And you would agree with me, would you not, based upon a review of the medical records, that the upper right quadrant fullness has been a frequent complaint of Mr. Maxwell, dating all the way back to 1945?

A. That's correct.

* * * * *

[104] MR. ERSPAMER: Q. Here is 30 October 1947, tender area in upper right quadrant, correct, from Dr. George G. Spellman?

A. I think that's a tender area, though. I don't think the fullness comes up until much later.

Q. Well, you would agree with me, would you not, that he had problems in the upper right quadrant area consistently throughout the period of service and his separation from service, starting in 1945 to the present?

A. Per the records that are here, yes. Whether there were continuous or not, I could not speculate on that.

* * * * *

MR. ERSPAMER: Q. Although Mr. Maxwell's diary reports, does it not, consistent problems like that during this period?

A. I'll have to look back through the recapitulation.

* * * * *

[105] THE WITNESS: All right. I reviewed his reconstructed medical history. It shows him complianing of chest pains in November of '55, in September '58, August '61, June '62. And each of those times there was no diagnosis made.

He had chest pains again in September of '64. The doctor says it was possibly calcium spasms.

He had complaints of chest pains in February of '68, again in December of '69, July '70. And in August 1970 they made a diagnosis of a malrotation of the kidney, and they thought that it was something to do with, I believe, the [106] small intestine, some kind of spasm in there.

Then he had complaints in October '70, November '70, March '72, August '73. There were some complaints in January 1977, but that was in a different location, the lower left chest part area.

Then in January '82 he had chest wall pains thought to be secondary to an upper respiratory tract infection.

Then in March of '82 he had some abdominal pains. It didn't say the location, but they thought they were secondary to renal stones. And then again in August of '82 they thought the pains were secondary to kidney stones.

This is by his own list.

MR. ERSPAMER: Q. Do you have any reason to question any of the entries made in here?

A. No.

Q. Now, did you review the entries made in here in connection with your rating decision?

A. Yes.

Q. How did you treat the upper right quadrant pain aspect of Mr. Maxwell's claim in your rating decision?

* * * * *

A. I'll refer directly to the rating on which it's based.

[107] We deposed of it by saying that the complaint that he had was a symptom only.

Q. What does that mean?

A. That means it is strictly a symptom. Every disease or disability usually has various symptoms. And we do not rate symptoms. We rate disease or disability entities.

Q. So the upper right quadrant fullness was a symptom of something else?

A. I don't know what it is a symptom of. We do not make medical opinions on what the symptoms belong to. That is strictly left up to doctors who are examining the veteran.

Q. Under what conditions do you generally conclude that a claim is denied on the grounds that it's a symptom only? Can you give us some other examples?

A. What do you mean?

Q. First of all, the rating decision denied the claim of upper right quadrant pain on the grounds that it was a symptom only.

A. Right.

Q. What other types of situations do you generally arrive at that reason for denying a claim?

A. Okay. Let's say that a person is in the service, and he has complaints of shoulder pain, and they can't find any disease entity. We would deny that.

Q. What tests were conducted in connection with Mr. Maxwell's claim for upper right quadrant pain?

A. I don't know.

Q. Did you know at the time that you made the rating [108] decision and you have forgotten, or did you never know?

A. That I can't answer.

Q. Can you determine from the file whether any tests were conducted for the upper right quadrant pain to try to determine its etiology?

A. All I know is that he had the standard test. There is a hematology report in the file. There is a chemistry test, called Chemistry 1 on the form.

Q. That relates specifically to his upper right quadrant pain?

A. No. This is just the general tests that they gave the veteran for the examination that they give him.

Q. Well, my question has to do with the tests that related to his upper right quadrant pain, if any.

A. They took an upper GI series.

Q. That's in his gastrointestinal tract?

A. Right.

Q. Well, that has nothing to do with the upper right quadrant fullness, does it?

A. I haven't the slightest idea. That's one reason why we don't make decisions based on symptomatology, because symptoms are just that, symptoms. They could come from a variety of complaints—or not complaints, but disease entities, just acute and transitory conditions.

* * * * *

[109] Q. Is it the responsibility of the doctor member of the rating board on any occasion to prepare the rating decision, or is that always done by a legal specialist or occupational specialist?

A. Currently it's done by the occupational or legal specialist.

Q. And not by the doctor?

A. No.

* * * * *

[110] Q. Approximately how many Statements of the Case do you produce in a month, or a range, if you can give me a range?

A. Probably from five to ten.

Q. Do they generally take longer than a rating to prepare?

A. Yes.

Q. Why is that so?

A. Because the Statement of the Case incorporates the rating itself into the Statement of the Case. It includes a summary of the veteran's history. It starts out with his service. It starts out with sort of a brief history of what has occurred in the past. Then it goes into date by date actions of the rating board, requests for records, replies from the veteran or the claimant, and then a summary of the laws that apply for whatever the claimant is appealing. Then we have a short statement on our decision, and then we have to write a summary on why we made that decision.

Q. So it's considerably more involved, the Statement of the Case, than a rating?

A. Usually.

Q. What kind of time credit do you get for preparing a Statement of the Case?

A. Let me see. I guess the best thing—we have a [111] sort of a point system. I get six points for a rating and ten points for a Statement of the Case, to give you a sort of approximate figure.

Q. What is a point?

A. That's just sort of a grading type thing that the office has developed to find out whether we're producing the correct number of cases per day or per month.

There are regulations or manuals that cover how much credit—how much time it should take for each rating, how much time it should take for each Statement of the Case.

Q. How many points are you expected to generate in a month's period?

A. We're supposed to average about six and a half points per hour.

Q. What else do you get points for?

A. We get points for review of a case, for doing development, either for requesting service medical records or scheduling an exam, supplemental statement of cases, which you're given less credit than you are for a Statement of the Case.

We get points for other types of formal ratings that we do. We have things called memorandum ratings. We have what are called confirmed ratings, which is a review of a medical document, either a hospital report or a single doctor's statement.

Q. You have deferred ratings?

A. Deferred ratings.

Q. What is the point credit for a deferred rating?

[112] A. Two points.

Q. And what is the point credit for a confirmed rating?

A. Four points.

Q. And what about a memorandum rating?

A. Five points.

Q. And a Supplemental Statement of the Case?

A. Six points.

Q. And scheduling an examination?

A. Two points.

Q. And development?

A. Usually two points.

Q. What about review?

A. Usually two points, depending on how much. If it's a simple review, basically no points. If it's a more complicated review—

Q. Do you meet the standard of six and a half points per hour generally?

A. Yes.

Q. Do you exceed it?

A. Yes.

Q. It's important in your evaluation to get a rating higher than six and a half points, is it not, points per hour?

A. Of course.

Q. What would place you in the upper reporting area for points per hour?

A. They just changed that. Usually one to two points more.

Q. If you're up around eight, you're doing pretty well?

[113] A. Yes, very well.

Q. What is the highest point ratio that you're aware of that anybody has received?

A. That I don't know.

A. What is the highest you have ever accumulated?

A. Seven and a half.

* * * * *

[116] Q. Inside this particular issue is a report of the Advisory Committee on Former Prisoners of War, pursuant to Public Law 97-37, which I believe was issued several months ago. I've got another copy of it somewhere in pamphlet form put out by Congress, but this one doesn't seem to have a date, this particular copy of it.

My question, though, is have you seen the report of the Advisory Committee of the Former Prisoners of War? I'm handing you a copy of it as reproduced in the Ex-POW Bulletin.

A. No.

Q. Were you previous to today aware of its existence?

A. No, not the details on something like that.

Q. Is there a person in the Northern California Regional Office in charge of monitoring reports of this type, making sure that people get ahold of them?

A. I can't answer that.

Q. You don't know?

[117] A. I know my section chief is steeply involved with the POW issues. So whether he is keeping track of something like that or not, I do not know.

Q. Next I'm going to just hand you four packets put out by American Ex-Prisoners of War, Inc., National Medical Research Committee. Packet 1 is "Claim Information." Packet 2 is "Stresses of Incarceration, Aftereffects of Extreme Stress, Psychological-Neurological Residual Nervous Conditions." Packet 3 is "Arthritis, Alcoholism, Visual,

Ulcer, Varicose Veins, Skin, Impotencey, Brain Damage, Tuberculosis," et cetera. And Packet 4 is "The Heart, Arteries and Veins." Part 1, and "Cancer," Part 2. The main title is "The Aftereffects of Incarceration."

I ask you whether or not you have ever seen these volumes before.

A. No.

Q. Previously in your deposition I had asked you whether or not you were familiar with a report by John P. Kirchner, M.D., about liver disease in former Prisoners of War. I have obtained a copy of the report just so you could verify that you are not familiar with this, having at least seen a copy of it in front of you.

A. No.

* * * * *

[118] MR. ERSPAMER: Q. Is there one of the rating board specialists who specializes in POW cases assigned to keep track of the medical literature regarding POW diseases?

A. Not that I know of.

Q. Is anybody in the Northern California Regional Office, to your knowledge, assigned the task of keeping track of literature regarding POW diseases?

A. I do not know that.

Q. Is there a file maintained at the Northern California Regional Office of medical literature pertaining to the diseases suffered by POW's?

A. Well, we have a file that contains medical literature in general, but I don't recall seeing those particular documents there.

Q. Do you recall seeing any medical reports on the incidence of disease or about diseases prevalent among ex-POW's in that file that you just mentioned?

A. No. There might be, but I don't recall seeing it.

Q. But as you sit here today, you can't recall any particular ones?

A. (Witness shakes head.)

Q. Okay. You are aware, are you not, that there is a considerable body of literature out there, medical litera-

ture, dealing with the medical problems suffered by ex-POW's?

A. I am aware there is quite a bit of literature.

Q. Is there a medical library at the Northern California Regional Office?

[119] A. Yes. There's a small one.

Q. Does it include, for example, periodicals, medical periodicals?

A. No.

Q. What does it include?

A. It includes dictionaries. It includes basic reference books concerning various diseases.

Q. Approximately how many volumes are in the library?

A. Between 40 and 50. That doesn't exclude—that excludes the basic volumes that are in each of the rating boards, which includes a medical dictionary—

Q. You're talking about extra copies of these?

A. No, no. Usually there's an extra copy of what we have in the medical library. But we have—each board has about seven or eight books concerned with medical references.

Q. Can you list a few of them for us?

A. There is the psychological book. It's called DSM-3.

Q. That's for post-traumatic stress cases mainly?

A. No. That's for all psychological problems. It's supposed to be the standard references by which psychiatrists evaluate their subject.

Then there is a medical dictionary. I think it's called Dorland's. There is a new book we just got on, I think, medical terminology, sort of a doctor's handbook.

MR. STOLL: PDR?

THE WITNESS: No. It's C-something.

We've got a two-volume general reference book on medical diseases and disabilities and stuff.

[120] MR. ERSPAMER: Q. Do you know who puts that out or what the title is?

A. No, I don't.

MR. STOLL: Not Merck's Manual?

THE WITNESS: No. We've got Merck's Manual. There is a Merck's Manual included in this.

Then there's a small volume of the psychological volume, sort of an abbreviated handbook.

MR. ERSPAMER: Q. Is that small volume put out by the VA or somebody else?

A. No, no. It's just a smaller copy of the DSM-3.

Q. So it overlaps DSM-3?

A. Well, yes. It's just a smaller, abbreviated form.

Q. Okay.

A. Oh, and then there's the pill book, the—

MR. STOLL: The PDR?

THE WITNESS: Yes. You know, the medicine book to show—

MR. ERSPAMER: Q. P-E-R?

MR. STOLL: PDR, Physician's Desk Reference.

THE WITNESS: It shows all that, current medications and what kind of side effects they might get.

Then that's just generally what's assigned to every rating board, and I have my own personal references that I bought, including my own Merck Manual and a couple of anatomy books, and a large volume of medical references put out by Besom's.

* * * * *

[121] A. Besom's.

Q. How do you spell that?

A. I think it's B-e-s-o-m-'-s. Then I've got a couple of other books.

Q. What are those?

A. Ones on surgical treatment and postoperative problems.

That's about it.

* * * * *

[137] MR. ERSPAMER: Q. I take it that you have adjudicated a matter of hundreds of claims for the VA?

A. That's correct.

Q. And I take it some have been more difficult than others?

A. Yes, that's true.

Q. Can you characterize what the most difficult types of claims you have had to adjudicate are, from your own personal standpoint?

[138] A. What do you mean by difficult?

Q. Complex, hard to grapple with, hard to decide, hard to develop, any of those things.

A. Well, the hardest cases, of course, are trying to get evidence to support or deny on development on radiation claims, because it takes—it's time consuming. Post-traumatic stress disorders, it's very time consuming to develop all the information you need to make a decision.

Agent Orange are less complicated.

Some of the more complicated ones are the ones that involve special monthly compensation cases, where the person, let's say, has multiple sclerosis and diabetes, whose body has become almost overcome with a disease, or, say, an accident, say, like this case I was giving you as an example of PTS. If that becomes service connected, we have to—it's much more difficult to evaluate somebody like that, because we have to know just how limited they are to be able to write it up correctly.

When you get diseases like multiple sclerosis, they involve multiple body systems. It starts affecting their organs, procreation, their urinary and bladder abilities, their ability to use their extremities. It all requires a—to look at those particular body systems or extremities as a single entity and then try to combine it to put it together so we're paying the veteran the correct amount.

Q. Any other types of categories of claims? I know one of the other witnesses has mentioned gunshot wounds as a particular difficult claim, particularly many years after [139] the fact, with secondary problems and so on. Have you run into that problem?

A. Not especially. Usually, unless they're new gunshot wounds, once they're rated or evaluated, they're—most of the time there's a few complicating factors that come up later on. Some of the wounds in the abdominal region or to the head can become more complicated, either by becoming worse or sometimes even becoming better.

Q. But any other ones that you would characterize in the area of difficult or complex?

A. Well, one of the most difficult ones, or more complex—not so much, I guess, more complex, it's just that they require an awful lot of work—is a veteran who has been in for 20 or 25 years, and he has 30 disabilities he's claiming on his first rating, or his initial claim, because you have to look at each one and look at the service medical records and get an exam for it, and then write up the rating to itemize each one of those, say how it affects his ability to work on each one of them and put it together.

Q. Do you get any special extra credit for those multiple type claims?

A. No.

Q. You don't get any special credit for the more difficult or complex cases that you mentioned, like Agent Orange, post-traumatic stress or radiation claims?

A. No. It's sort of based on an average. They figure there's enough easy cases to sort of balance out the more complicated ones.

* * * * *

[140] Q. Well, the Agent Orange cases didn't start until after the Viet Nam war; correct?

A. Well, the Agent Orange cases are fairly simple. The only accepted disability for Agent Orange is chloracne.

Q. So they're all denied basically?

A. Not all of them, but most of them are.

Q. Are you aware of any Agent Orange claim that has ever been granted for anything other than chloracne?

A. No.

Q. That's granted based on a skin condition?

A. That's correct.

Q. And it's always rated at ten percent, is it not—

A. Not necessarily.

Q. —or usually rated at ten percent, chloracne?

A. Not necessarily. I've seen it as high as 30 percent.

Q. Post-traumatic stress cases have been a lot more frequent since it was first recognized in—what was it, '80 or '81?

A. I think that's true.

* * * * *

[141] MR. ERSPAMER: Q. And that resulted in sort of a flurry of post-traumatic stress claims?

A. That's correct. The flurry is still going on.

Q. Is it?

A. Yes.

* * * * *

[142] Q. You said earlier you spent approximately 24 hours on the Maxwell file. It threw you quite a bit off on your point system, did it not?

A. Yes, it did.

Q. Are you getting special dispensation from Mr. Verrill for that?

A. Well, they allowed me to exclude it as part of my countable hours.

Q. It's rare that you would spend 24 hours on one claim, is it not?

A. Very rare.

Q. Have you ever spent that much time on one claim before?

A. No.

Q. You testified as to several things you did during those 24 hours earlier today. Can you recall what other things you did during those 24 hours?

A. Other than drafting up several ratings, no.

Q. Were you told by anyone to be very careful on this particular claim and spend more time, or did you spend all this time completely on your own?

A. Well, I got the word that it was a special case, yes, if that's what you mean.

Q. Who did you get the word from? Mr. Hoffschneider?

A. Right.

[143] Q. What were the instructions you received from Mr. Hoffschneider in that regard?

A. To be careful, to make sure what I did was right.

Q. That was in what, May of 1983?

A. I think I first started to work on the Maxwell case sometime in April. It would have to be in April, because the first rating I did was on May 12th, and I had been working on it for some time prior to that.

Q. Well, none of your requests to the National Personnel Records Center went out until May; correct?

A. I would have to look.

I think the one to National Personnel Records Center went out, I believe, in February, and we got the reply back—it must have went out sooner than that, because we got the reply back in February of 1983. That's to the National Personnel Records Center.

Q. Were you working on the case then?

A. No.

Q. You first started to work on the case in either late April or early May; correct?

A. Well, in April or earlier.

Q. Pardon me?

A. It was in April or earlier.

Q. Can you explain the circumstances under which you came to be assigned to the case?

A. That's when we started the POW portion of the board. And that, as near as I can tell from recollection, was in March.

[144] Q. At the time Mr. Hoffschneider told you to be careful and make sure what you did was right, were you aware that this lawsuit had been filed and Mr. Maxwell was a plaintiff in this lawsuit?

A. That I couldn't say.

Q. Pardon me?

A. That I couldn't say. All I know is that sometime during the period I was working on it I became aware of it.

Q. It was after you became aware of it that you spent the 24 hours?

A. I can't answer that. I don't know.

* * * * *

[146] MR. ERSPAMER: Q. What is your understanding of the role the personal hearing plays in the adjudication process?

A. What do you mean by role?

Q. What function does it play?

A. The function for the hearing is—ideally it's for the veteran to present new evidence or additional evidence. Most of the time it is more of a public relations type mecha-

nism, for the veteran to come in and talk, and a lot of times our decisions are more clearly explained or explained in a different manner to assist him in understanding the decision.

We also provide him with suggestions on how to prove his claim.

Q. Do you find that in most cases the hearings are not used—the information presented at the hearings does not particularly sway you?

A. No, most of the time it doesn't

Q. Most hearings come after a Statement of the Case has been prepared?

[147] A. That's correct.

Q. In fact, it's a local policy of the Veterans Administration in San Francisco not to provide a hearing until after a Statement of the Case?

A. Yes. They will allow the claimant to know what the decision is, what it's based on, the laws on which it's based. That way the claimant has the knowledge to come to the hearing informed.

Q. That is the policy; correct?

A. That's correct.

Q. How has that policy been communicated to you?

A. What do you mean?

Q. How did you first learn that that was a policy?

A. It's been the policy ever since I've been there.

Q. Is it written down somewhere that you know of?

A. That I couldn't tell you.

Q. 38 CFR provides that a claimant is entitled to a hearing at any time on any issue; correct?

A. That's correct.

Q. And the local policy is more restrictive than that; correct?

A. Usually, yes.

Q. Do you—

A. You know, it's not set in concrete. If the veteran insists or the claimant insists, then they can have a personal hearing. But as a matter of course, we find it's better for the claimant to come into the hearing informed about what we based our decision on, the laws that are [148] involved

in the decision and why we made the decision. Then they can come in with their arguments against it or come in and ask educated questions on how they can prove their claim.

Q. Do you recall receiving a handwritten note or memorandum from Mr. Verrill regarding the subject of when hearings ought to be provided, which said something to the effect that hearings are not to be provided before the Statement of the Case in, quote, all but the most unusual cases?

A. I don't recall any such message. There may have been one.

Q. Do you recall your section chief ever having explained to you that that would be the policy locally?

A. No. They may have. But that's been the policy since I've been there. So if they said anything about it, it was just—it just reinforced what I already knew, and I wouldn't pay particular note to it.

* * * * *

MR. ERSPAMER: Q. Let me hand you what has been marked previously as Exhibit 17-137 to 17-138 in the Verrill deposition and ask you whether you have ever seen the original or a copy of that particular document before.

A. No.

Q. But the policy expressed in there is consistent with your understanding of the local policy?

A. Yes.

Q. Is that policy still being applied today?

A. Yes.

* * * * *

[150] Q. It's difficult to work with the materials without developing your own cross-referencing system?

A. That is true.

Q. And that's because there are a lot of different sources of substantive and procedural standards?

A. That's correct.

Q. And it can be found in all kinds of different things, including what, circulars?

A. Circulars.

[151] Q. Procedural manual?

A. That's the M21-1.

Q. Right.

A. And the regulations.

Q. The regulations themselves. They're also in adjudication memoranda locally?

A. Yes.

Q. Do you maintain a set of those?

A. Just the ones concerning me, yes.

Q. Those are received from Mr. Verrill generally?

A. Yes.

Q. And there is the M1-1 manual. Is that a procedural manual?

A. M21-1?

Q. No. M1-1.

A. I don't know what that one is.

Q. Are there any other manuals that you turn to as a source for rules?

A. I have a rating board training manual that tries to explain how we should rate individual types of disabilities. And then we have the rating guide—rating schedule it's actually called, which tells the diagnostic codes and the criteria for the percentages for each of the disabilities.

MR. STOLL: Is that in the CFR?

[152] THE WITNESS: Yes.

MR. ERSPAMER: Q. You have never heard of the field appellate procedures manual, M1-1?

A. Oh, yes.

Q. Is that another one?

A. It's not one that's handed out to the rating board members. I have a copy of it.

Q. Have you ever had occasion to refer to it?

A. Yes.

* * * * *

Q. Do you ever have occasion to get into the work history of claimants that file claims?

A. That's part of what we use for some of our judgments, yes.

Q. Do you find that a substantial number of claimants have gone through periods of unemployment in the past?

A. Some of them have, yes.

Q. And a substantial number of them are currently unemployed?

A. I couldn't answer that.

Q. Well, you get a lot of unemployability claims; correct?

A. Yes, we get a number of unemployability claims.

Q. And they're usually filed by people who are not currently employed; correct?

[153] A. Usually, yes. We have people who file for unemployability who are still employed.

Q. Do you have a rough idea about what kind of percentage of unemployability claims you get?

A. No.

* * * * *

[155] [Q.] Have you ever sent out an unemployability case for an advisory opinion?

A. Yes.

Q. It's more trouble to send a case out for an advisory opinion?

A. Very definitely.

Q. Do you have to get approval from your section chief to do that?

A. No, I don't have to have approval. It goes through him, and he makes sure that I have all the information necessary to support my submission for individual unemployability.

Q. Is anybody's approval besides your own necessary in order for that to go out?

A. No.

Q. Now, in the area of disability compensation claims, the vast majority of people who file have some disability? The query is whether it's service connected or not, but the vast majority of people have some disability; correct?

A. That's correct.

* * * * *

[159] MR. ERSPAMER: Q. Do you recall any instance in which you initially denied a claim by means of a rating and the [160] claimant has requested a hearing, and as a result of the information presented at the hearing, you changed your mind?

A. Until the last hearing I had, I would have had to say no to that. The last hearing I had, after I get the hearing transcript back, I'll probably order a new exam.

Q. That would be based upon what, an inadequacy in the record?

A. Sort of what I consider a discrepancy between the psychiatric evaluation and the symptomatology the veteran exhibited at the hearing.

Q. The symptomatology displayed by the veteran at the hearing indicated to you a problem more serious—

A. Yes.

Q. —than that shown in the psychiatric evaluation?

A. Yes.

Q. But other than that instance, you can't recall another instance in which you have changed your mind after a personal hearing?

A. Changed my mind?

Q. On a rating decision.

A. No.

* * * * *

[163] Q. Have you ever sent an atomic veteran—by that I mean an atomic radiation claimant—to a VA facility for an exam to determine whether or not the disease he suffers from was radiogenic in origin?

A. I don't recall ever doing that.

Q. Have you ever sent such a claimant to a private physician for a medical opinion?

A. No. We're not allowed to do that.

Q. You're not allowed to do that?

A. No. Any kind of private medical opinion, we would request the opinion from the hospital, and they would go out to the appropriate medical facility or medical doctor to request that opinion.

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VOLUME 1
DEPOSITION OF THOMAS H. JACOBSON
October 21, 1983
(CAPTION OMITTED)

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[2] MR. ERSPAMER: Q. Please state your name for the record.

A. My name is Thomas Hughes Jacobson.

[3] Q. And you are an attorney; is that correct?

A. That's correct.

Q. What year did you graduate from law school?

A. 1981.

* * * * *

[4] Q. Okay. When were you first employed by the Veterans Administration?

A. I was hired in September 1972 in Philadelphia.

Q. What position were you hired as?

A. GS-5, adjudicator claims examiner.

Q. What was the address of that office?

A. 5000 Wissahickon, W-i-s-s-a-k-i-o-n, I believe, something like that, Avenue, Philadelphia, Pennsylvania.

Q. Is that the Philadelphia Regional Office?

A. Yes, it is.

Q. Can you briefly describe the job functions of an adjudicator claims examiner in that office.

A. Initially I was trained to process and award benefits for education claims. After about six months to a year, I was trained to award benefits in compensation and pension claims. And I stayed in that position and rose through the ranks until I got onto the rating board, where I have been since April 1977.

* * * * *

[6] Q. Can you describe the functions you perform as a rating board member.

A. Well, it's my job to decide whether or not veterans are entitled to compensation for service connected disabilities. It is my job to decide whether or not veterans are entitled to nonservice connected pension because they're per-

manently and totally disabled. It is my job to decide whether or not widows and orphans are entitled to pension if the death of the veteran had been due to service connected reasons.

[7] There are a number of other benefits that we adjudicate, but generally they fall within those parameters.

* * * * *

[8] Q. Just roughly, how many ratings do you participate in in, let's say, a given year or a given month?

A. Well, generally I write about six or eight ratings a day. And I suppose if we multiplied that out, we could find out how many in a year. I suppose we work about 20 days a month, 12 months a year. Let's say 11 months. 220 days times six or eight is a thousand.

And then it's my responsibility to sign off on ratings that other people write. So I probably sign off on another thousand of other people's that it's my responsibility to review and ensure that they're as accurate as the ones that I would write.

* * * * *

[10] Q. Now, you mentioned that the rating board is composed of an occupational specialist, a medical specialist and usually a legal specialist. What are the requirements for the position of a legal specialist?

A. You must be an attorney. I understand you must be an attorney. Before I was an attorney, I was an occupational specialist.

* * * * *

[15] Q. How frequently in cases you have handled has the claimant been unrepresented, in other words, represented himself or herself?

A. I don't know that I could assign a percentage. It's at least 25 percent that do not have representatives, I would think. Maybe I'm wrong.

Usually I don't look at it other than just to fill in that box at the bottom of the ratings or to give the service representative a copy.

I have noticed that recent military retirees tend not to have a service representative, but there is no other pattern that I can see.

Q. Can you just describe the frequency with which attorneys are involved here in the Regional Office, in your experience?

A. Very rarely, other than Swords to Plowshares. We occasionally get an attorney who is doing a favor for some veteran, trying to help him, or some widow.

* * * * *

[19] Q. You also mentioned that the fairness of the fee limitation was the subject of discussions among members of the rating board. Can you describe what those discussions were?

A. Well, I don't remember anything specific, other than the fact that we talked about it. People who are not attorneys generally don't have the high regard for attorneys that those of us who are have for attorneys.

I do recall discussing with Judy Kephart of the California Department of Veterans Affairs the merits of having attorneys represent claimants.

Q. Was this recently?

A. Yes. It wasn't too long ago.

[20] Q. What did she have to say on that subject?

A. Well, she's a service representative, and she felt that on the cases that had merit, that the service representatives were able to adequately provide representation but that they did have a tremendous work load and that they weren't allowed to choose their clients.

Q. And did you respond?

A. Yes. I told her that I felt that in a number of cases that the veterans would be better off having attorneys represent them, because I felt that they would possibly get a fairer shake.

Q. In saying that, were you calling upon examples from your own experience as a rating board member?

A. Well, I think that all of us who have worked at the rating business for any length of time have seen cases that we would not have done in the same manner. And these cases range from matters of judgment to matters of error.

I think that if a case goes to the Board of Veterans Appeals, that the veteran will get the fairest shake possible. I think if the case is adjudicated in the Regional Office, that in the main the case will be well rated but there will be the exceptions to the rule.

Cases that I rate and take part in, I make every effort to give the veteran what he's entitled to under the law.

Q. Now, you said you have seen cases that you would not have done in the same manner and they range from matters of judgment to matters of error.

What matters of error have you seen in the adjudication [21] process with respect to veterans represented either by service organizations or representing themselves? Can you give us some examples?

A. Well, I have seen cases where service connection was denied and it should have been granted. I have seen cases where we overpaid the veteran due to an error on our part, either some form of pyramiding of the disabilities or in one case I saw we exceeded the amputation rule.

I have seen cases where I felt that service connection was granted in error, and I have severed service connection.

The rating process is done by human beings, and errors exist. And many things are matters of judgment.

* * * * *

[22] Q. Then in cases where it's not shown in the service medical records or within the presumptive period, the claimant has the burden of showing that the particular condition he has was caused in service, was the result of something that occurred in service; right?

A. Could you rephrase that?

Q. Sure. In instances where the service records do not show the condition while he was in service and there is no manifestation of it within one year, the one-year presumptive period, the claimant has the burden of showing the connection between something that happened in service and the current medical condition he has, in other words, the [23] burden of causation?

A. Well, I think that this would apply in a number of types of cases. One that comes to mind is post-traumatic

stress disorder. The veteran during service has a stressor probably a combat incident, and then many years later has a diagnosis of post-traumatic stress.

Yes, if the cause is shown during service, we would certainly service connect.

Q. But the claimant has the burden of showing that connection, in proving to the Veterans Administration that there is a connection there between that stress and the current psychological condition he has in the case of post-traumatic stress?

A. Are you talking about the legal burden of proof?

Q. Well, the burden of proof in the adjudication process. In other words, if he doesn't introduce any evidence on it, you can't grant service connection; correct?

A. Correct.

Q. So he has the burden of coming forward to show that connection?

A. Yes. But if we have some evidence, it is then our job to decide if service connection is warranted.

* * * * *

[25] Q. What types of things do you think you as an attorney in general could do better than the service representatives, in your experience? And I understand you don't want to criticize them, but I'm just concentrating on what you feel you as an attorney could do better than an untrained service [26] representative.

A. Well, I think that there are some cases that are denied because all the evidence hasn't been obtained, and other cases I think are denied because some rating specialists misinterpret the law.

I think an attorney can argue the law much better than a lay person. Of course, an attorney could amass a much better brief of the facts of the case than a lay person could, I would think.

The quality of the service representatives varies. Some are very good and do very good jobs, and some are not quite so good.

Q. And a lot of the service representatives who are in the good end of the scale, or the better end of the scale, are very busy. Is that correct?

A. Yes. They have very large work loads.

Q. They can't do all the things that they would like to do, if they had more time, in the way of development?

A. I assume that in the cases that they believe are meritorious, that they make every effort. In the cases that they suspect they can win, I would think they work harder than the cases that they think they would lose. That's what I would do.

Q. Has any service representative ever commented to you about the fact that their work load is very heavy?

A. Yes.

Q. And has any service representative ever described his work load specifically to you, in terms of how many cases [27] he was handling or how many claims he was handling, he or she?

A. No, I don't recall any specifics. It's just a well known thing that everyone that deals with the adjudication of benefits, whether it's the rating board or the claims examiners or the service representatives, we do a tremendous number of cases.

Q. And you would agree with me, would you not, that in a case where the service representative or the attorney or the claimant does a lot of the workup on the case—for instance, secures buddy statements and goes out on his own and gets all the medical records, puts it all together and writes a brief and so on—in those circumstances it makes your job easier, does it not?

A. Oh, yes. It does, yes. It's always easier to find entitlement if it exists. And if the case is well briefed and well prepared, possibly entitlement does exist.

Q. Do you normally receive a written brief of facts and law and an interweaving of the facts in the nature of what an attorney would do?

A. The only one who ever gives that to us is the Swords to Plowshares. And, of course, that's because they're attorneys.

Q. And the service organizations do not do that?

A. No. The service organizations do occasionally give us a memo as to their arguments in the case, particularly if the case is on appeal.

* * * * *

[28] Q. Approximately how many hearings do you participate in on a monthly basis?

A. Well, of course, it varies from month to month. But I think this month I have four or five. Generally it's four or five, one a week or so. Actually, many of them are cancelled. So it may be one or two a month actually show up.

Q. And is that, according to your information, a fairly average number of hearings for someone in your position?

A. Yes, I think so. We don't have a lot of hearings.

* * * * *

[29] A. Well, these hearings are nonadversary. The purpose of the hearing is to allow the veteran to present his evidence, present his story in his own words. And generally that's about the size of it.

Generally it's at the end of the appeal stage where we have decided over and over we're not going to grant the benefit, and the case is almost ready to go to the Board of Veterans Appeals.

* * * * *

Q. Do you have any explanation as to why there are so few hearings?

A. Well, I suspect the service representatives don't want to have hearings where there is no real additional evidence to be presented. So therefore they only have [30] hearings where the claimant insists on it or where they think the decision is particularly outrageous in the light of the evidence of record.

Q. It is the local policy, is it not, generally not to schedule hearings before a Statement of the Case?

A. That's my understanding.

Q. Do you recall receiving a memo from Mr. Verrill, a handwritten memo from Mr. Verrill to that effect approximately a year ago?

A. I don't specifically recall that, but it certainly could have happened. It's helpful at the hearing to know what the issues are and to have the claimant have some idea of why we're denying the benefit and what the laws are that apply.

Q. What is the source of your understanding that the local policy is not to schedule hearings before a Statement of the Case?

A. Well, I think this applies to rating board decisions. On the character of discharge and other things, like competency, of course, a hearing would be scheduled beforehand if desired.

Q. What is the source? Who told you about this policy? If you read it, where did you read it?

A. Well, it has been a long policy for years that we would try to give him a Statement of the Case first and then schedule the hearing. And recently we had some paragraphs added to our standard paragraphs to put into the Statement of the Case at the end of it to describe to him why the hearing [31] was in order to make sure that he did indeed want a hearing.

* * * * *

[32] Q. Handing you what has been marked previously in the Verrill deposition as Exhibit 17, and directing your attention particularly to 17-137—I'll take the sticker off here—have you ever seen the original or a copy of this handwritten memo before? And please take time to read it to acquaint yourself with it.

* * * * *

[33] A. Well, at this time I don't recall seeing this memo. But for years this has been kind of an unwritten policy, that we would try to give them a Statement of the Case first.

Q. So there is nothing in there that shocks you?

A. No, no.

Q. Or that's inconsistent with the policy as you are acquainted with it?

A. No.

* * * * *

[40] Q. It's a document on VA form 21-526 entitled "Veteran's Application for Compensation or Pension." Is that correct?

A. Yes, that's correct.

Q. And it has a stamp indicating it was received on May 3rd, 1983?

A. Yes.

Q. Turning to the second page in the back, on item 24 under the caption Nature of Sickness, disease or injuries for which this claim was made and day each began, there is listed in handwriting, lung problems, dash, 1973?

A. Yes, that's correct.

Q. And the veteran's name is—or signature is under item 41 on the back of the second page?

A. Yes, that's correct.

Q. And this form was apparently filled out by the veteran himself?

A. It appears so.

Q. It's all in the same handwriting.

A. Yes, it appears so.

* * * * *

[41] Q. I see. Did anything else in this particular claim accompany the form claim that is the four pages we have just referred to?

A. Yes. Also the veteran sent in a form 4138 wherein, I believe, he alleges—yes—that he was exposed to Agent Orange and that it's his opinion that his lung problems are due to that exposure.

Q. And you are referring to a one-page form that is immediately above the application for compensation and pension in the file entitled "Statement in Support of Claim," dated April 20, 1983?

A. Yes.

Q. If I might read into the record, the claimant writes in apparently his own handwriting, "I wish to file a claim for service connection for lung probmems. My problem did not start until I was out of service. However, I have been exposed to the herbicides and"—he apparently misspells it— "defoliant while on active duty in Viet Nam, and my problem started shortly out of service, and there is no history of this problem in my family, nor did I have this problem prior to entering into service.

I contend this is a result of something while I was in the service and could be awarded service connection on a presumptive basis"?

A. Correct.

Q. "Presently I am being seen at the VA OPC in Sacramento, California"?

A. Yes.

[42] Q. What does OPC stand for?

A. Outpatient clinic.

Q. There is nothing on this statement which indicates that the service organization participated in its preparation, is there?

A. Not to my knowledge. They may well have helped him fill it out. The form 2322 was filled out the same day.

Q. What is a form 2322?

A. This is the appointment of a power of attorney or the service representative. It does—one could conclude by looking at these forms that the service representative did indeed help the veteran do this, since it was done on the same day.

Q. But you really can't tell by looking at the form that the service representative assisted, correct, or can you?

A. I don't see any stamp from the organization.

* * * * *

[43] Q. Then on the appointment of service organization as claimant's representative, that's in the right-hand file; correct?

A. Yes. It does say up here, abbreviated, "Acknowledged" on 5/5.

Q. '83?

A. Yes. A-c-k:

Q. What does that mean, that the service organization acknowledged that it was representing the claimant?

A. No. I think the VA acknowledged that a a power of attorney existed for this veteran.

Q. It doesn't indicate any particular person is representing the claimant?

A. No. Just the organization.

Q. Is that typical?

A. Yes.

* * * * *

[47] Q. You have some reports there that are in the file. The next thing is the rating decision.

Now, in connection with this particular file, did you consult with a medical specialist with regard to the question of causation before the rating decision was issued?

A. As I recall, I did not talk to Dr. Rockwood before I wrote the rating. However, when he was signing it, I talked to him about it, and he felt that the decision that I had made was correct. And we discussed the problem medically with—these recurrent pneumothoraxes. And I think we may have discussed his childhood asthma also.

Any relationship it might have had with Agent Orange, medical principles recognize that Agent Orange causes chloracne, which is a skin condition. To this point in time medical science has not related any other condition to Agent Orange.

Q. It's true, is it not, that the policy at the [48] Regional Office here is to deny Agent Orange claims unless they're related to chloracne?

A. Yes. There is no sound medical basis for any other decision.

Q. And in connection with this particular claim, did you review any medical literature with regard to the question of causation between Agent Orange exposure and the types of problems this veteran was claiming were assocation with his dioxin exposure?

A. No, not in this case. I dealt with many Agent Orange cases, and I knew the policy, and I knew what sound medical principles dictated. So I didn't have to research it, no.

* * * * *

[49] Q. The policy that you earlier referred to with regard to Agent Orange exposure is communicated in the letter to the effect that, quote, "The only condition recognized as caused by exposure to Agent Orange is chloracne"?

A. Yes.

* * * * *

[54] Q. And this particular claim was for what?

A. Well, he claimed many things. He claimed service connection for headaches, defective vision, residuals of hepatitis, residuals of shell fragment wounds to the head and

other places, and any disability due to Agent Orange exposure.

Now, a number of these issues had already been resolved [55] by the rating dated June the 1st, 1971. And it fell to me to resolve additional issues and to restate the previous denials.

Q. And in addition deny the Agent Orange claim?

A. Yes. He had no chronic skin condition. He did not have chloracne.

Q. So that was basically a fait accompli?

A. Yes.

Q. Again looking through this, can you page through the middle portion of the file and determine whether or not a personal hearing was held in this case?

A. There was no pesonal hearing requested.

Q. I see. Can you isolate the original claim having to do with the most recent claim that was filed in 1983?

A. Well, here in a claim dated 2/16/83, a form 526. I believe that was his claim.

Q. Is that signed by the veteran, or is it signed by a service representative?

A. Well, it's signed by the veteran. It was signed the same day as the power of attorney was given to the CDVA.

Q. Suggesting that he had assistance in preparing the claim again, as with the other case?

A. Yes. It was typed on the same day, and medical evidence was submitted along with marriage certificates and birth certificates. So it would appear that he did have help from the CDVA, apparently the Yolo County Veterans Service Officer where the veteran lives, in Woodland.

Q. Do you know who that is?

A. No, I don't.

[56] Q. Is there any way you can determine who that particular person is from the file?

A. No, not to my knowledge

* * * * *

Q. Was there any private medical opinion submitted in connection with this claim?

A. Well, there were medical statements which are here of record.

Q. Those are medical records, correct, of treatment and so on?

A. Yes.

Q. But there is no medical opinion specifically submitted on the question of whether or not Agent Orange exposure caused the problems the claimant was seeking service connection for?

A. No. We obtained from the VA medical center in Fresno an Agent Orange exam, which is the VA protocol to try and identify all veterans who think they have some disease due to Agent Orange exposure and keep a record of their names in case medical science ever determines that Agent Orange exposure does indeed cause something other than chloracne.

* * * * *

[58] Q. You are referring to a rating decision dated March 23rd, 1983, about a third of the way down the file?

A. Yes. Let's see what he claimed on his original application.

The original application was filed August the 6th, 1982, on campus. Apparently the veteran was going to school somewhere. There is no service rep here. And he claimed various problems stemming from Viet Nam.

I don[illegible]e anywhere Agent Orange. Do you?

Q. I[illegible]e nature of sickness in item 24. That's where [59] it would probably be, would it not?

A. Yes.

Q. He has listed there 1969 to 1971 in Viet Nam, and he lists stomach ulcers, jungle rot, skin rash, kidney involvement, right foot and back.

Some of those might be Agent Orange related; correct?

A. But he doesn't specifically say due to Agent Orange. That was my point.

* * * * *

Q. In paging through there, do you see any evidence [60] that a hearing was ever held in this case?

A. No. There was no hearing requested or held.

* * * * *

[63] A. I think in this case, when I saw the veteran's original claim, I presumed that he was claiming Agent Orange exposure. He didn't actually state it, as we noted.

Q. And the original claim, that was dated sometime in August of 1982?

A. Yes.

Q. Now, you don't see any evidence in this file that a private medical opinion was furnished?

A. No, no.

* * * * *

[65] Q. I just wanted to cover briefly the method by which you chose those three Agent Orange files this morning. You just picked those out randomly among the files you have worked on, the Agent Orange files; is that correct?

A. The adjudication officer's secretary had a folder filled with requests for Agent Orange examinations. These requests were sent to the hospitals. And I looked through those and picked by terminal digits ten cases that had been in digits that I had had. And then I went to the files and found those three. They were the only three I could find.

I was informed that this was necessary at 15 minutes to 9:00, and I complied by 9:15.

Q. That's fine. I was just wondering the process you went through.

So they were more or less randomly selected?

A. Yes, randomly.

Q. And in your opinion, they are representative of the files, Agent Orange files, that you have worked on?

A. Absolutely.

* * * * *

[67] MR. ERSPAMER: Q. Why don't we take the first one and open it up. It's again the same kind of file we discussed this morning, with three overleaves; correct?

A. Yes.

Q. There is actually one loose page here.

A. That's a letter to the veteran.

Q. Should that be in the center here?

A. Yes, right there.

Q. Is there anything on the left-hand side of this first file which has been marked as Exhibit 180 that relates to a service connected death and disability compensation claim?

A. No, nothing whatsoever.

Q. Then what about the right side?

A. On the right the veteran was represented by the Disabled American Veterans.

Q. We'll have that copied and take that.

Move down, if you would, to the place in the file where the atomic radiation claim was initially filed, and take a look at the initial filing.

A. In 1975 the veteran was entitled to nonservice [68] connected pension due to rheumatic heart disease.

Q. Okay.

A. In 1979 the veteran filed a claim on August the 20th alleging that exposure to radiation produced heart problems and fatty tumors.

Q. You're reading from item 24 of the original claim, which bears a received stamp of October 31st?

A. Right.

Q. Actually it bears several stamps: October 31st, August 30th, and it looks like August 8th, three different stamps.

What do the three different stamps indicate to you?

A. These stamps are from different Regional Offices. One was the Regional Office in Portland, one here and a second one from here.

Actually the veteran signed this on September the 24th. Maybe he sent it in once and he forgot to sign it and it was sent back to him, maybe.

Q. I see. Okay. Can you tell from looking at the file what was submitted with the original claim, whether a statement was or affidavit or anything like that?

A. It looks like just the original claim. However, there was a letter here that the veteran said he was exposed to radiation at Desert Rock, Nevada, in 1955.

Q. That's below the claim there on a form that's called what?

A. This is a 96 letter, FL 96. And we sent this to the veteran and asked him to finish completing the VA form [69] 526. He forgot to sign it.

We also asked him to tell us the date on which he was exposed to radiation. And initially he wrote, "No one told me I was exposed to radiation. Check service records for dates." Then someone else wrote in red ink, "Desert Rock, Nevada, 1955."

Q. Can you tell from comparing the original claim to the appointment of the service representative with a power of attorney to the right there whether or not they were filed coincidentally?

A. It appears they were filed about the same time. The appointment of the service rep was done on 9/5/79.

Q. What happened next, after that claim was filed?

A. Well, we asked the veteran to tell us where he was exposed to radiation. We actually sent him two letters. One was November the 9th, 1979, and one was November the 26th.

Q. The November the 26th letter, this is a standard form letter used in all the ionizing radiation claims asking for information, is it not?

A. Yes. I believe that was the standard form at that time. I think what happened here is that—well, then the veteran answered.

Q. We see some handwriting written by, it looks like, the veteran's wife, some notes?

A. Mm-hmm.

Q. What is this, another form?

A. He filed another original application and said the same thing, that his heart problems were caused by atomic [70] tests.

Q. Is that signed by the veteran?

A. Yes.

Q. And that's dated 2/26/80?

A. Yes.

Q. The file doesn't reveal any action on his original claim in between the dates of those two filings?

A. No.

Q. Is that kind of odd, that he would file another claim for the same thing?

A. Well, it may have been that the Regional Office took the end product when he failed to respond within 60 days.

Q. So the file was closed?

A. Yes.

Q. What is the period of time intervening between the date of the request for information—that's what? 11/26/79?

A. Then they took the end product on 1/31.

Q. That's shown in ink on the request letter, by the indication in ink, "No reply, 120-C, 1/21/79"?

A. Yes.

Q. They closed it 60 days later?

A. Yes.

Q. What is 120-C?

A. That's just the end product, 120.

Q. Okay.

A. Then he filed another claim just a few days later. So then the process started again.

* * * * *

[71] Q. After the second claim was filed on—what is the date of that?

A. 2/26/80.

Q. Okay. What was submitted in connection with that claim in addition to the regular form? Is it just a little note from the veteran's wife?

A. Yes.

Q. "We are sending everything to you and certainly hope you will be able to help us"?

A. Yes.

Q. And that's written in hand on a half page.

Then what comes next here? An acknowledgement of the receipt of medical records; right?

A. Yes.

Q. That's dated January 29, 1980.

A. I think what happened here is he sent in this form without his claim number

Q. Without his prior claim number?

A. Yes. So they couldn't identify it. No; he sent in these records, and they couldn't identify it, so they sent it back to him and gave him this form. So he sent the form in.

* * * * *

[74] Q. This looks like another letter—

A. Another letter from the veteran.

Q. Dated 1 November 1982. And he says, among other things in there, "It has been almost a year since your letter. I would like to know what the problem is regarding my service records. I know that a lot of it is classified, but something must be done fairly rapidly. Do you need any more information from me?"

He also says, "I understand there is a new test out involving the chromosomes that show residual radiation exposure. I am certainly ready to think about this test. Do you have any information regarding this test? Please reply as soon as possible as time is of the"—I believe that's supposed to be "essence," but it's misspelled.

* * * * *

[76] Q. Before we get into that and I show you that Program Guide, did you rely upon any medical opinion in making this rating decision?

A. None other than just sound medical principles.

Q. Well, I'm not asking whether you applied medical principles. First of all, you are not a doctor, are you?

A. No. But a doctor signed it and agreed.

Q. Who is the doctor that signed it and agreed?

A. Dr. Cerber.

Q. What is his training?

A. He's an internist.

Q. Does he have a specialty?

A. No.

Q. Is he just a general practitioner?

A. Yes, that's it.

* * * * *

[77] Q. Is it your consistent practice to discuss a rating with the doctor, the medical conclusions, at least, part of it that you reach in a rating decision before you sign it?

A. No. Due to my experience on the rating board, if I know what the answer is, I go ahead and write a rating, and if the doctor thinks differently, he'll tell me so.

Q. So you just assume if he has a difference of opinion, he'll bring it to your attention?

A. Yes.

Q. In some instances he will perhaps sign off on a rating sheet like this without there having been any direct consultation between you?

A. Yes.

Q. I see. What is the procedure you would go through on rating decisions you're responsible for? Would you sign it yourself and route it to him somehow?

A. Well, we all work closely together, within just a few feet.

Q. I see. So you would just—

A. I would date it and sign it and give it to the other person, and he would look at it and sign it. Then he [78] would put it on the doctor's desk. This doctor works half time, so when he comes in, he signs off on the ratings we have accumulated.

* * * * *

[80] Q. Have you ever requested an independent medical examination in an atomic veteran case?

A. You mean by someone other than the VA?

Q. Correct.

A. No.

Q. Someone outside the VA?

A. We only order examinations by the VA Hospitals. I understand the Board of Veterans Appeals can request an independent review. It may well be that we have a procedure to do that ourselves. I have never heard of anyone doing it.

Q. Have you ever referred an atomic veteran to an expert in the area of radiogenic diseases for a medical examination? And I am referring to a VA expert.

A. At this time I can't recall ever doing that, no.

* * * * *

[81] Q. What is your understanding of what a reconstructed dose means?

A. Well, I believe what they do is try to find some record of some individual in this man's unit for whom they have a dosage based on the badges that they wore during that primitive time, and try to speculate as best they can as to how much he was exposed to.

Q. That would reflect the gamma radiation, when you're speaking of the dosage that is referred to there, the .44 rems?

A. I have a little chart at my desk that tells me how significant are the rems or the rads that the person was exposed to. I don't keep that information in my head. I understand this is a small amount.

Q. I'm just talking about generically. When you get these readings, it refers to the amount of gamma radiation as opposed to beta, alpha, alpha emitters and other types of radiation. Is that your understanding?

A. I am not particularly knowledgeable on the different types of radiation.

[82] Q. So you don't know what that's referring to?

A. No.

* * * * *

Q. Under the arrangement that the VA apparently has with the Defense Nuclear Agency, the only information you receive is the reconstructed dosage reading, or in the case of an individual film badge, the film badge readings?

A. Yes.

Q. And you get no information as to how to deal with other sources of possible radiation exposure from the DNA?

A. Well, I think that you have to recognize that these radiation cases are few and far between, and reach is dealt [83] with on an individual basis.

Q. My question is whether you get any information from the Defense Nuclear Agency when you make a request for exposure information with respect to ingestion, inhalation, or exposure from other sources.

A. I don't know.

Well, I take that back. I have seen cases where we have been able to obtain actual radiation exposure by dates. These are recent veterans, not atomic veterans, but recent veterans aboard ships. And they have a specific form for it that the military uses.

So I suppose that the defense establishment that you were discussing could furnish such an item.

Q. I'm limiting my question to atomic veterans. You have never seen any information from the Defense Nuclear Agency that takes into account exposure from anything other than external gamma radiation, have you?

A. No.

Q. Do you currently have any active atomic veteran cases that are under consideration for ratings?

A. I may have some. We don't keep cases on log or on diary as you might in a law firm. We develop them and send them to the clerks, and eventually they come back to us.

Q. So you don't have, for instance, a file of active cases inside your office?

A. I'm sure we have some. I just don't know the numbers.

Q. I mean in your particular office, where your work [84] station is. Is that correct?

A. I don't have any there that I know of.

Q. It's true, is it not, that for many atomic veterans, dosimeter readings are not available?

A. That has been my experience.

Q. Have you had difficulty in many cases obtaining service records for these individuals, medical records?

A. Well, in many cases these are World War II and Korean War veterans whose records were destroyed in the fire at the National Personnel Records Center in St. Louis, if there ever were any records. And I understand that when they did these atomic tests, that not everyone wore badges as they should. No one understood the seriousness of the possible effects of radiation at that time.

Q. And given the long period of time since the exposure, it's kind of difficult, you would agree, to reconstruct the actual dosages received?

A. Well, I have no way of knowing. I can only speculate on that. That's beyond my province really.

Q. So you basically, as regards the radiation exposure levels and so on, rely upon the Defense Nuclear Agency?

A. That's the only evidence that we receive.

Q. And it's true, is it not, that you're not allowed to turn to any other source for information besides the Defense Nuclear Agency? Your instructions are to rely upon the information of the Defense Nuclear Agency?

A. Well, I don't know who else there is to go to.

Q. But your instructions are to rely upon them?

[85] A. Yes. We have a procedure that we go to the military and ask them.

Q. Now, that takes us up pretty close to the top, if we might continue on in the file. Where were we when we left off here? A letter to the veteran, I believe, and then the additional reports.

It looks like a microfiche copy next, dated April 28th, 1955, which lists the veteran's name on it, does it not?

A. Yes.

Q. Do you know where that was obtained from?

A. I think that all of this came in together from Max Woodall.

Q. I see. Okay.

A. It's the final reply on the attempt to document the veteran's exposure.

Q. Okay.

A. And the rating board looked it over and decided that the previous decision was correct, that entitlement to service disconnection for rheumatic heart disease was not one of them.

Q. I believe in your initial rating decision you found that there was no evidence of tissue—what is it?

A. Fatty tumors, he claimed.

Q. What was your conclusion based upon?

A. Well, he hadn't furnished any medical evidence that fatty tumors existed.

Q. Was any hearing held in this particular case?

A. No hearing was requested, and none was held.

[86] Q. I see. Do you recall receiving any private medical opinion in connection with this case?

A. No, no private medical opinion.

* * * * *

[87] Q. Again, if you would move down to the original claim file—

A. Okay. The veteran filed the original claim on June the 22nd, 1982. He claimed a number of disabilities, including exposure to radiation in 1954 and exposure to Agent Orange. He claimed heart disease, malaria. He said he had chloracne due to Agent Orange. He said he had cysts.

Q. Did he file that claim on his own, or did he have a service representative's assistance?

A. He had no service rep.

Q. That's again on the standard form, 21-526, bearing the two stamps received June 22nd in the Veterans Hospital?

A. That's the hospital in Palo Alto.

Q. And then it was referred up to the Regional Office on the 24th?

A. Right. He filed it, I think, probably because he was out there getting some sort of treatment.

Q. Was there any statement submitted in support of the claim?

A. No.

Q. It was just a simple two-page form; right?

A. Right.

* * * * *

[93] Q. Then there is a letter here dated December 9, 1982, to the veteran requesting medical records and so on and other information?

A. Yes. Sometimes if we can't get the medical records, we ask the veteran if he has them. Oftentimes the retirees, when they get out of the service, will either take their originals or take a copy. And sometimes we can get them from the vet.

Q. Then we have another statement in support of claim dated 12/9/82?

A. Right.

Q. That's responding to your letter of December 9, 1982?

A. He says, I don't have them, but I wish I did.

Q. A fairly prompt response, I would say.

A. Yes. Well, then I told him to request his naval service medical records from World War II. And I told him to [94] follow up on the radiation exposure at Desert Rock.

* * * * *

[95] Q. Do you have any person permanently assigned to the San Francisco Regional Office who is an expert on radiogenic diseases?

A. No. We have two doctors, one who is an internist and one who is a retired renal specialist, a surgeon. Other than that, we have no special skills.

* * * * *

[97] Q. Do you ever get any information upon which they based this reconstructed dose?

A. Well, as I said before--I told you all I knew before.

Q. They don't ever explain to you how they arrived at that figure?

A. I don't recall ever seeing one. Well, I do have a vague recollection of them saying, "Well, other men in the unit were exposed to these amounts." So the maximum amount the veteran could have received had to be the highest of these, which was equal to one X-ray.

Q. And that's again external gamma radiation; right?

A. I don't know.

* * * * *

[100] Q., I see. But my questions have to go to the question of whether you would expect, assuming an exposure, a radiogenic disease such as leukemia or cancer to manifest itself within one year. My question is, you would not expect that?

A. No, I wouldn't. But I would expect to see—from what little I know about the sound medical principles involved, I would expect to see large amounts of radiation exposure during service.

* * * * *

[102] [Q.] The next area I would like to go in a little bit is post-traumatic stress. First of all, what kind of workup do you do as a rating board member or direct the action toward in cases of post-traumatic stress?

A. Well, generally the veteran files a claim, and usually he attaches a little statement that says, "I was in Viet Nam, and I was in combat, and I have flashbacks and nightmares, and I think I have post-traumatic stress."

* * * * *

[103] Q. What are the peculiar problems that you have identified, if any, with regard to proof or winning a post-traumatic stress case?

A. Well, the important thing to me is that since the veteran is now 10 or 15 years out of service, we want to document that he actualy had a stressor, a psychological trauma during service, such as would produce in most people a post-traumatic stress reaction.

It's very easy if the veteran was in combat. If he had a CIB, a combat infantry badge, or a combat medic badge, if he was wounded, that's a stressor.

[104] Q. Okay.

A. The hard cases are the guys who were truck drivers, the guys who were MP's in Saigon. These cases are more difficult to identify the stressor.

Q. As a matter of practice, is an effort made to identify and interview soldiers who were present with the veteran at the time of the claimed stressful event?

A. Well, not to my knowledge. However, we recently received a memo from Central Office wherein we were supposed to find out in one particular case who the alleged buddies of the veterans were that were killed. And then we were supposed to go to the military and find out if indeed they had been killed, as the veteran alleged.

* * * * *

[105] MR. BLECKER: What if the veteran was unable to come up with evidence of his other troops that experienced his experience and basically you essentially had just the veteran's word and military records that, in your mind, did [106] not confirm or refute his experience? How would you resolve that?

THE WITNESS: Well, this is the usual case. It is the rare veteran, including myself, who can possibly remember the name of anyone he served with 10 or 15 years ago, other than nicknames.

The law contemplates the idea of a reasonable doubt. The evidence need only establish a reasonable doubt, that is, a probability of entitlement. We don't have to establish entitlement to a moral certainty. If you have a diagnosis and

you have the veteran alleging various trauma and you have done everything that you can to document or disprove, then you finally must make a decision, and it's on the basis of reasonable doubt versus possibility.

I have seen cases go both ways. I have seen the BVA uphold and deny. It's a very complex question.

* * * * *

[108] Q. Have you had any cases in recent memory where you have rated a case and the Board of Veterans Appeals has vacated your rating that you can recall?

A. Do you mean where I have denied service connection?

Q. No. Where you have granted service connection.

A. And they have taken it away?

Q. No. Where you rated the case, and they have taken away the rating, saying that the rating should be different or higher.

A. Higher?

Q. Yes.

A. Well, I am certain that's happened. You see, we [109] get shifted around every six months, and by the time our cases get to the BVA, we're some place else in the building, and when they come back, we don't often see them.

Q. There is no system for review locally based upon the cases that are sent back by the Board of Veterans Appeals so you find out about them and find out the basis for it and so on?

A. Well, if it's other than a routine case of some special interest, then sometimes I have seen cases photocopied and sent around so everybody could look at them. If you're on a board, generally you see the cases that are interesting that come back that were resolved on that board.

In the past I have made an effort to go and get the files after they come back, but I only do that rarely.

* * * * *

[127] Q. Most of the veterans who lose on the initial decision level do not pursue the case any further. Isn't that correct?

A. I understand there are statistics that the Board of Veterans Appeals publishes which shows the number of Notices of Disagreement. I understand that it is rather small. That has been my experience. I might do 50 ratings and get two Notices of Disagreement. Those are just numbers off the top of my head. But that really doesn't consider how many we grant. You know, no one appeals the favorable decisions. So you have to look at it in terms of the denials and reductions.

* * * * *

[129] Q. Now, how much time credit do you get as an end product code for doing an initial workup on a compensation case?

A. We have to keep track of the number of dictated ratings that we do, and we just mark them down. Each dictated rating is worth one hash mark, and we get so many points. I think it's six points. It doesn't matter whether we spent three days on the rating or two minutes. They are of equal value in terms of the statistics kept by management.

Q. And similar point credits are in effect for other types of action taken by adjudication personnel—for example, preparing a Statement of the Case?

A. Yes. When we do a Statement of the Case, we mark that down, and we get ten points for that.

We're supposed to generate 5.5 points per hour. That would be approximately one dictated rating an hour.

Q. So you're encouraged to work at a rather methodical speed by this system; is that correct? For instance, if you spent ten hours doing one particular rating, you would feel you were behind?

A. Well, in order to meet the minimal accepted requirements for the job, you have to do 5.5 points per hour.

Q. What happens if you don't meet the minimum?

[130] A. Then they say your performance is unacceptable.

* * * * *

[131] Q. Well, have you ever heard anybody express the thought that the credits are inadequate to allow the proper performance of the particular tasks?

A. I don't really recall any specific instance. I'm sure that it has come up.

Q. You have heard that opinion expressed, but you can't recall any specific instances? Is that right?

A. I have no recollection of anyone actually saying those words or having that intent.

Q. What about words to that effect?

A. It is my own personal opinion that it is ludicrous to have such production standards. But they exist, and there is nothing that I can do about it, and so I live within the system.

* * * * *

[134] Q. What types of claims do you consider complex, require more work?

A. Well, the PTS cases are hard. Some of the POW cases are hard. The radiation cases are hard. The initial applications by retirees, when we get out of the service, they always have a lot of disabilities. So, you know, you might have to rate 10 or 15 different disabilities.

* * * * *

Q. Now, in your capacity as a rating specialist—and I want you to limit your answer to just based upon your own position within the Veterans Administration—can you see any disadvantages in the performance of your duties that would result from elimination of the fee limitation?

A. No.

Q. Do you see any advantages? For instance, more workup on the files because attorneys would do the work?

A. Well, you have stated the obvious. I would agree with that. The cases that we get from the Swords to [135] Plowshares have a nice brief with all the evidence. It's much easier.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOINT APPENDIX

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Volume II

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TABLE OF CONTENTS OF APPENDIX*

	Page
Relevant District Court Docket Entries	1
Complaint For Declaratory And Injunctive Relief, with Exhibits A through K, April 13, 1983.....	18
Memorandum Decision And Order denying defendants' motion to dismiss, October 21, 1983	97
Declarations and Affidavits:	
Declaration Of Walter R. Atlee, August 19, 1983...	122
Declaration Of Clarence William Autrey, September 24, 1983	126
Affidavit Of Ronald G. Bakal, March 30, 1983.....	129

*The district court opinion, Order Re Modification, Notice To All Veterans And V.A. Claimants Regarding Hiring Of Attorneys, Order Re Posting Of Notice, notice of appeal from the preliminary injunction, and notice of appeal from the order re modification were attached as appendices to the jurisdictional statement and are not reproduced herein.

Affidavit Of Mary Baluss, with attachments (Affidavit Of Emanuel Staub and Affidavit Of Harold J. Nussbaum), July 1, 1983 131
Declaration Of James L. Bianchi, April 12, 1983 ... 139
Declaration Of John Burke, November 10, 1983 142
Declaration Of Don E. Cordray, with Exhibit A, July 14, 1983 146
Supplemental Declaration Of Don E. Cordray, November 9, 1983 152
Affidavit Of Howard J. De Nike, April 28, 1983 155
Declaration Of Glenn Dorfmeier, July 15, 1983 158
Declaration Of Charles E. Joeckel, Jr., with attachment, November 16, 1983 160
Declaration Of R. Charles Johnson, March 29, 1983 ... 170
Declaration Of Frederico Juarbe, Jr., November 17, 1983 173
Declaration Of Thomas McBee, November 7, [1983] .. 178
Delcaration of Eldon D. Praiswater, November 10, 1983 181
Declaration Of Leonard W. Schroeter, April 11, 1983 184
Declaration Of Malcolm C. Souness, November 15, 1983 187
Declaration Of Richard D. Standefer, November 18, 1983 190
Declaration Of Ralph C. Vaughan, November 16, 1983 192
Declaration Of Reason F. Warehime, with Exhibits A and B, July 13, 1983 195
Declaration Of Doris J. Wilson, July 15, 1983 216

Depositions:

Excerpts from Deposition Of Wesley J. Hawke:
[Volume I], October 24, 1983 219
Volume II, November 3, 1983 226
Excerpts from Deposition Of Thomas H. Jacobson:

Volume I, October 21, 1983 253
Volume II, October 24, 1983 281
Volume III, November 2, 1983 297
Excerpts from Deposition Of Albert Maxwell, June 14, 1983 307
Excerpts from Deposition Of Richard B. Standefer:
Volume I, June 15, 1983 330
Volume II, June 16, 1983 345
Excerpts from Deposition Of Thomas A. Verrill:
Volume I. May 3, 1983 370
Volume II, May 6, 1983 386
Volume III, June 17, 1983 401
Volume IV, June 21, 1983 420
Volume V, July 8, 1983 430
Volume VI, July 11, 1983 434
Excerpts from Deposition Of Max R. Woodall:
Volume I, June 23, 1983 435
Volume II, June 24, 1983 464

Exhibits:

2—Form letter sent by Northern California Regional Office to unrepresented claimants who request hearings 507
4—Agent Orange Claims, November 1, 1982..... 509
9—New Adjudication Work-Rate Standards, effective October 1, 1981 510
17—Excerpts from Verrill's Personal Copy of V.A. Adjudication Manual-M21-1 511
46—Radiation Exposure Claims—Disposition At Regional Offices, March 1, 1983 515
47—Board Of Veterans Appeals Radiation Cases, October 22, 1981 516
48—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), First Quarter, Fiscal Year 1983, March 23, 1983 .. 517

49—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), Fiscal Year 1982, March 18, 1983 518
56—Board Of Veterans Appeals—Disposition of Appeals Involving Agent Orange, Fiscal Year 1982, March 18, 1983 519
57—Agent Orange Claims, March 1, 1983 520
58—Herbicide Exposure Claims, June 2, 1980 521
60—Appeals Statistical Data—Board Of Veterans Appeals, March 28, 1981 522
62—Don E. Cordray's VA Appeal Form 1-9 (Substantive Appeal) 523
63—Board Of Veterans Appeals—Disposition of Appeals by Type of Hearing, Fiscal Year 1982, January 11, 1983..... 525
64—Undated letter to Reasons Warehime from T.A. Verrill, VA Adjudication Officer, re: waiver of personnel hearing 526
65—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing In Fiscal Year 1982 527
66—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing in Fiscal Year 1977 528
67—Excerpt—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, 10/1/81-9/30/82 529
68—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, Fiscal Year 1977 530
69—Board of Veterans Appeals—Travel Boards Representation In Appealed Cases (includes Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976) 535
70—Excerpts from Chapter II, "The Special Legal Problems and Special Difficulties of Access of Veterans" of the Legal Services Corporation

Report To Congress On Access Of Veterans To Legal Assistance, with attachments 542
74—Excerpt—Average Length, In Minutes, Of Claimant Hearings Before the BVA 573
75—Board Of Veterans Appeals—Overall Representation (including Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976)..... 574
76—Disposition of Veteran Administration Claims On Appeal, 10/1/81—9/30/82, with Exh. L ... 582
77—Total BVA Cases in 1982 = 35,758, with Exh. J 584
78—BVA Representation In Appealed Cases, 10/80-9/81, with attachment 587
99—Excerpts from VARMS Report "PVAR25"—VA Data Processing Center Printout Re: Disposition by Reasons-Quarterly and Cumulative, May 5, 1983..... 589
101—Questions Presented from the Jurisdictional Statement in *Gendron* v. *Levi*, 423 U.S. 802 (1975) 598
115—Letter to Doris J. Wilson from Jack A. Collier, VFW Department Service Officer, re: Personal Hearing, May 26, 1982 599
124—Board Of Veterans Appeals—Informal Hearing Presentation, April 13, 1983 600
126—Excerpts from defendant's letter to Gordon Erspamer, re: supplemental response to plaintiff's first set of interrogatories, July 15, 1983 602
153—Statement Of Accredited Representative In Appealed Case (name withheld), re: Agent Orange, July 8, 1982 606
154—Statement In Support Of Claim (name withheld), re: PTSS Claim, December 9, 1981 .. 607
157—Statement In Support Of Claim (name withheld), re: Agent Orange Claim, July 15, 1981 608

173—VA letter to claimant (name withheld) denying claim for radiation exposure, August 28, 1978 609

177—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26489948), April 20, 1983 610

178—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26375945), February 23, 1972 611

180—Exhibits to Jacobson Deposition—Appointment Of Veterans Service Organization As Claimant's Representative, September 5, 1979 and Statement In Support Of Claim, June 30, 1975 re: Radiation (Claim File No. 26705288) 612

181—Exhibits to Jacobson Deposition—Statements In Support Of Claim, re: Radiation (Claim File No. 23396989), August 2, 1982 616

194—Exhibits to Jacobson Deposition—Letters to Dan Forest, Disabled American Veterans, December 5, 1980 and to M.H. Tallen, VA Adjudication Officer, December 12, 1980, re: withdrawal of Power of Attorney from DAV (Radiation—Claim File No. XC-5646292) ... 622

Miscellaneous:

Exhibit A to Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction 625

Letter to Mylio S. Kraja, Executive Director of American Legion from John P. Murphy, VA General Counsel, introduced into evidence at 12/1/83 Hearing, re: Preliminary Injunction, September 27, 1983 628

Excerpts from Hearing Transcript, re: Preliminary Injunction, December 1, 1983 631

Order noting probable jurisdiction 634

VOLUME II
DEPOSITION OF THOMAS H. JACOBSON
October 24, 1983
(CAPTION OMITTED)

* * * * *

[144]

Q. And the evidence in the case has also established that a high percentage of claimants who, after initiating an appeal by filing a Notice of Disagreement, abandon an appeal before a substantive appeal is ever filed, in other words, between those two stages.

Has that also been your experience?

A. Yes. I send out a much larger number of Statements of the Case than I ever receive substantive appeals. Egotistically, I think this is because my arguments are persuasive.

Q. Your arguments in the Statement of the Case?

A. In the Statement of the Case and the law and the facts.

Oftentimes I think that when the veterans disagree, they don't understand why we decided what we did. And in the Statement of the Case, wherein we explain it, then they accept it and don't continue on with the appeal.

Occasionally we even had had a veteran write back in and say, "I agree with what you've said. I withdraw my appeal."

Q. Most of them abandon the appeal by merely failing to file a substantive appeal; is that correct?

A. That's correct.

Q. Then there would be a record purpose disallowance entered?

[145] A. Well, on the rating board we write the Statement of the Case, and the section chief sends it out to the claimant. And they have a computer system called VARMS, VA Appeals Records Maintenance.

An end product is taken when the Statement of the Case goes out. I think what they do is if he sends in his substantive appeal, then they reactivate the computer system for the control of appeals. If he never sends it in, I don't think anything else ever happens.

Q. Now, in preparing the Statement of the Case, you find, do you not, that your legal training is useful in summarizing the facts and the law?

A. Yes, I do. I went to law school for that purpose.

Q. In fact, your ability to prepare Statements of the Case has improved since you went to law school?

A. Yes, I think so. Also I have had a tremendous amount of experience over the number of years that I was going to law school. I went to law school four years at night and have done thousands of cases in each of those years.

* * * * *

[146] Q. I think in your earlier testimony you described three different types of specialists that are on a rating board—a legal specialist, an occupational specialist, and a medical specialist?

A. Yes, that's correct.

Q. Do all three of those specialists prepare statements of the case?

A. The medical specialist does not prepare Statements of the Case.

Q. Can you explain the reason for that?

A. The medical specialist is a doctor, and his primary knowledge is medicine. And although over the years they learn the laws that we operate under, they are not involved in the preparation and dictation of ratings or Statements of the Case.

They review them and sign them and give their opinions on the medical question.

Q. Now, in giving their opinions on medical questions, is there a requirement that those opionions be in writing?

A. No. The board members will ask the doctors, "doctor, we have these facts in this case. Will you look in [147] the folder and tell me what you think," that kind of thing. And then he tells them what he thinks about it, and then they go ahead and prepare the rating.

Q. Is there any requirement that the opinion given by the doctor verbally be placed in writing somewhere in the file?

A. Well, since he'll be signing the rating, he will be, in effect, stating that that's his opinion as to the medical facts.

Q. My question is, putting aside the fact that he signs the rating, is there any place in the file where you, the occupational specialist or the legal specialist, are required to place any verbal opinion given by a doctor in the file?

A. No, not by the rating board doctor.

Well, I might say in that regard that in a rating decision, or in a Statement of the Case, in the write-up part of the write-up may well include verbatim the doctor's opinion as to the medical facts in the case. I think that's what you're looking for.

Q. Well, what source would the person drafting the Statement of the Case turn to if there has been no written medical opinion in order to prepare the, quote, summary of the opinion?

A. When you write a Statement of the Case, theoretically you should be able to write the Statement of the Case from the rating that had been made denying the benefit.

[148] Q. Now, in other instances the person who is writing the Statement of the Case would have had no contact with that file prior to the preparation of the Statement of the Case; correct?

A. That's correct.

Q. So he would look at the rating and the fact that the signature of the medical specialist was contained in the rating, and he would prepare a Statement of the Case paragraph dealing with the medical issue based upon the rating and the fact the signature appeared there? Does that correctly summarize your testimony?

A. Well, I'll tell you what I do when I write a Statement of the Case. We get a Notice of Disagreement, then I look at the rating and appreciate the reasons for the denial as stated in the rating. And then I review all of the evidence of record, including the service medical records, any VA examinations, any VA Hospital summaries or any private medical evidence and conclude for myself that the denial of the benefits is indeed correct.

Then I make a write-up of the Statement of the Case, wherein I chronologically list the evidence that has been received and chronologically list the adjudication action—in other words, the rating and the Notice of Disagreement.

Then I ascertain the appropriate laws and regulations and cite them. And then I explain the reasons for the decision, what the facts have shown and how those facts apply to the law, and try to put it in words that the claimant is going to understand. I try not to make it particularly [149] legalistic.

Q. Now, in instances, however, where a verbal opinion was rendered by the medical specialist to a rating board member who does not eventually prepare a Statement of the Case, there is no way for the person preparing the Statement of the Case to have knowledge of that verbal medical opinion; is that correct?

A. Theoretically that medical opinion would be incorporated in the decision in the rating.

Q. I understand that. I'm talking about the exact substance of the verbal opinion. Since you have already testified there is no place in the file where verbal opinions are placed in writing, and combine that with the fact that a different person often prepares a Statement of the Case from the person who received the verbal medical opinion, there is no way in that situation where the person preparing the Statement of the Case would have exact knowledge of that verbal written opinion. Correct?

A. Well, I don't agree with your conclusion. I think that in the ratings that are written that the doctor signs, by reading the rating you can understand the medical basis for the decision.

Now, the reasoning shown in the rating might not be the exact words that the doctor used in verbally giving an answer to the specialist, if that's what you mean.

Q. There would be no way for the claimant to know the exact words used by the doctor rendering the verbal opinion from reading the Statement of the Case? Do you understand [150] the question?

A. Yes, I understand the question. However, I don't think that it is particularly relevant, because the Statement of the Case would explain the reasons for our decision, which would include the medical basis for the decision.

* * * * *

Q. In the cases where there is a verbal opinion there is no way for the claimant to know from reading the Statement of the Case the exact language that the doctor used in rendering that verbal opinion to the rating board member?

A. I would agree that it is not possible for the claimant to know the deliberations and the exact words used [151] by rating board members when reaching a decision.

Q. In fact, there is no way for the person preparing the Statement of the Case to know the exact language used by the doctor in rendering a verbal opinion to the rating board member unless he was that rating board member himself?

A. Or unless the exact words are shown in the rating decision.

Q. Correct. Is there a requirement that the exact words be shown in the rating decision?

A. None whatsoever.

* * * * *

[153] Q. Now, can you explain the referral procedures you go through in a radiation case in terms of working up the medical side of the case? When I say in a radiation case, I'm referring to an atomic radiation case.

A. Well, we have a pattern letter that we would send the claimant. And basically what it asks is, "What atomic tests did you witness?"

Q. I don't mean to cut you short, but we have already seen that in an example of the files on Friday; right?

A. Yes.

Q. I think in several exams, the date and time of the shot, who was present, whether a radiation badge was issued and so on.

A. Right.

Q. I think we have that already in the file.

A. Okay.

Q. Apart from the pattern letter, what else do you do in terms of the medical workup of the case?

A. Well, the same letter asks the veteran for authorization forms for all medical evidence relating to claimed conditions. And this is basically the place that we start on all claims. We ask the veteran to tell us where he [154] has been treated and by whom and give us authorization to get it.

If it was treatment by the VA or some military hospital, we don't need the authorization to get it. But if it's from a private source, we have to have the authorization.

Routinely we request, of course, the service medical records. So this is the medical workup that we would go through. We would obtain all service medical records, all VA records, all private records, amass them, and then determine whether or not a VA examination is warranted. We might well order the exam early on in the process, once we determine that it's necessary.

Q. Can you recall any case where you have ordered a VA exam in a radiation case?

A. No, I haven't. I'll take that—

Q. Well, what are—I'm sorry.

A. I take that back. I have ordered one. It didn't directly deal with the radiation issue.

Q. Okay. Have you ever ordered a VA exam dealing with a radiation issue in a radiation case?

A. No. But as you can imagine, oftentimes the veterans claim many things in addition to the radiation, and so you would be having an exam for other reasons.

Q. Now, can you explain the standards you employ in making the decision about whether or not to order an exam?

A. In what kind of case, or in all cases?

Q. In a radiation case.

A. Well, we would order an exam in a radiation case if [155] there was a reasonable probability that the claimed disability was the result of documented radiation exposure. It would be the same standard as any ordered exam. The standard is a reasonable probability of a valid claim for benefits.

Q. How can you make a determination as to whether there is a reasonable probability of a valid claim before you get the medical evidence?

A. Well, that's a very good question. Earlier on I was saying that there might be a case where the evidence was overwhelming from the beginning. It could exist. The normal case would be, of course, that it would take some time to develop the evidence.

Q. Now, I take it that all the radiation claims that you have adjudicated as a member of a rating board, there was an absence of a reasonable probability that the disability was a result of documented radiation exposure?

A. Yes. I have never seen a case where the documented radiation exposure was more than slight.

Q. And this is again—when you refer to documented radiation exposure, you're referring to the information you receive from the Defense Nuclear Agency?

A. Yes. Also the number of cases that I have seen, as I testified before, are not many. I think I said maybe 20. And many of those cases were cases where the veteran claimed conditions that were clearly unrelated to any possible amount of radiation exposure—for example, the aortic stenosis case.

[156] Now, I have done some cancer cases, and some of those were death cases, so it wasn't possible to order an exam.

* * * * *

Q. Can you explain the types of tests you are familiar with which you might order in a radiation case if you were convinced that a particular claim had the level of merit to order a physical exam?

A. Well, I don't really know what kind of tests you're referring to. I would just order a general examination of the disability in question and, if necessary, order a specialist's exam for that portion of the anatomy.

Q. Are you aware of the fact that in cases of an inhalation and ingestion of radiation, that radiation elements lodge in the tissues?

A. I am not a scientist, and I don't pretend to understand how radiation affects the body, no.

* * * * *

[157] Q. Now, in your adjudication of radiation claims has the subject of ingestion or inhalation or how to reconstruct a dosage of exposure by those means ever come up?

A. Not to my knowledge. In all the cases that I have worked on we have received a report from the military branch of the recorded exposure or the reconstructed exposure. That's all.

Q. So you basically rely on what they furnish you from the Defense Nuclear Agency?

A. Yes.

[158] Q. And if they ignore inhalation and ingestion, you ignore inhalation and ingestion; is that correct?

A. Well, I did have one case that I recall the veteran said that he was exposed in that manner. We considered it, but it didn't make any difference in our decision. We still denied the case.

I think that I would like to say that we do have some instructions in the Program Guide that we talked about last Friday that point out that there are different means in which the person could be exposed and that this exposure would not always be documented and that we should take this into consideration, to consider what the veteran says. And if it's proven that he was at these atomic bomb testing shots, that we should give it more consideration.

Q. Well, my question was, assuming that the information provided by the Defense Nuclear Agency includes only external gamma radiation exposure, you have no method by which you can determine exposure from other sources?

A. That would be correct.

* * * * *

[163] MR. ERSPAMER: Q. Have you ever seen decontamination reports prepared in connection with Operation Crossroads, the so-called XRD reports?

A. Not to my knowledge.

[164] Q. Are you aware of the fact that one of the conclusions reached in the decontamination reports during Operation Crossroads was that the condenser and salt water piping systems on the target and nontarget vessels that

participated in Operation Crossroads were contaminated with dangerous amounts of radiation?

A. I have no specific recollection of that fact, no.

Q. Well, assuming that that fact is true, you would consider that a relevant fact, would you not, in the adjudication of an atomic veteran's claim with regard to Operation Crossroads?

A. Yes, I think it would be a factor that would be considered.

Q. And it would be one you would want to know in order to properly develop the claim, would it not?

A. We would want to know all radiation exposure.

Q. So your answer is yes?

A. Yes.

* * * * *

[166] Q. Now, in your experience have you ever come to the conclusion that claimants represented by service organizations do better as a class in the presentation and prosecution of claims than unrepresented claimants, people who represent themselves, in other words?

A. I have never come to such a conclusion. I think that in the main, the routine cases, the simple cases that come in, it wouldn't make any difference.

* * * * *

[167] Q. You have come across quite a few situations or instances in the time you have been in the VA where the VA has made an error, have you not?

A. Rating boards are composed of human beings. Human beings make errors.

Q. You have come across quite a few errors made by rating boards in the past, have you not?

A. Well, I have worked on the rating board for six years, and I have written a few clear and unmistakable ratings, yes.

Q. And you have seen other clear and unmistakable rating errors done by other people?

A. Yes.

Q. You said it's only in the more complex cases where representation is necessary. What are the cases that you

consider the most complex of the ones that are currently being adjudicated by the VA?

I believe in your earlier testimony you already indicated, I think, that the post-traumatic stress cases were one of those. Is that correct?

A. Yes. The whole gamut of cases that you have been asking me about—radiation, post-traumatic stress, the unemployability, the asbestosis, the medically complex disabilities and the difficult causation questions that deal with medical facts, and the difficult legal questions which require judgment. I would just generalize by saying the complex factual and legal situations that require judgment.

Q. Can you detail, if you would, some of the difficult [168] legal questions that require judgment?

A. Well, I think any time you have to deal with a presumption, then this makes the case much more difficult.

Q. You have presumptions in the case of some of the chronic diseases—

A. Yes.

Q. —in the Pacific—

A. Yes.

Q. —that were suffered during World War II?

A. Oh, no. There is a one-year presumpion for 30 or 40 chronic conditions. The multiple sclerosis cases are particularly difficult, because there is a seven-year presumption. And what is necessary is a showing of any manifestation of the disease during the presumptive period. And multiple sclerosis has many manifestations. Those are very complex medical-legal questions, I think.

Q. In addition to the cases that have presumptions, what are the other difficult legal questions that require judgment which you referred to in your earlier testimony?

A. Oh, I think the cases that one disability proximately causes another disability. For example, I had a case of a man who was service connected for diabetes, and he went into insulin shock and wrecked his automobile and fractured his arm and developed paralysis of the arm, complete paralysis. So there are causation issues.

We do deal with claims of negligence at VA hospitals. Under 38 USC 351 we can pay compensation for additional

disability caused by VA medical or surgical treatment. [169] However, a finding of negligence or, quote, an accident—that is, an unforeseen, untoward event—is necessary.

Those, I think, are the most interesting and the most complex cases that we deal with.

* * * * *

MR. ERSPAMER: Q. Now, what other instances, if any, can you point to in the category that you mentioned of [170] difficult legal questions that require judgment, besides presumptions and the other ones you have indicated?

A. I think questions of aggravation by military service of a pre-existing disability require a lot of judgment and are difficult. Oftentimes the serviceman entered service with a disability, and the question is, did it become worse during service, beyond normal progression for that disability or disease.

Q. Can you give us an example?

A. Oh, take, for example, a person who had childhood epilepsy, had seizures as a child, took medication, and then about the age of 15 stopped taking the medication and had no further seizures, went on active duty, they accepted him, and while on active duty he had seizures. Should that be service connected by aggravation, or was the seizure condition not aggravated beyond normal progression?

And there are different standards for peacetime service versus wartime service.

Q. I don't understand. Different standards for what?

A. For analyzing the aggravation factor. If it's wartime service, there must be clear and convincing evidence that any increase in the disability was not beyond that which would be normally expected for the disability.

Take, for example, if a person went on active duty and had Hodgkin's disease, however it wasn't noted, and then two weeks later they found out he did have Hodgkin's disease, say, Stage 4. Well, we know that Hodgkin's disease cannot be aggravated by external factors. So once you establish that [171] it existed before service, then you have to deny service connection, because it is a condition that cannot be aggravated.

But say you have a condition of right knee strain, for example. And say before service he had to have surgery on the right knee, and it was asymptomatic when he went on active duty, and then during service he had another injury which aggravated it. We would service connect that.

I think it's a complicated area, and there are different standards for peacetime versus wartime.

Q. The standards for peacetime, are they more strict?

A. The standards for wartime give an extra benefit to the veteran, because the service is more rigorous. You have to have clear and convincing evidence of no aggravation. Whereas in peacetime you only have to have a specific finding of no aggravation.

Q. What do you look to for those standards that deal with preexisting disabilities and aggravation?

A. Well, they're almost always medical questions of—

Q. No. The standards of proof, I mean, the legal standards.

A. Oh, they're in 38 CFR. I can't give you the citation. I think it's 3.306. It's in that range there.

Q. Is there any place in the Program Guide or the procedural manual that would deal with that that you can think of?

A. No. It's mostly only in the 38 CFR.

Q. Yes. It is 3.306. Aggravation of preservice [172] disability?

A. Yes. There should be a paragraph for peacetime and a paragraph for wartime.

Q. Correct. B is wartime service, and C is peacetime service.

A. Right.

Q. Now, have you ever come across any situation in your experience where a presumption has been misapplied by VA adjudication personnel?

A. Well, clearly I have. I'm sure I have. These things are matters of judgment, and we might at the Regional Office decide to deny and say that a condition did not exist within the presumptive period. And I'm sure I have seen cases where the BVA overruled us and held that it was indeed shown during the presumptive period.

Q. Have you ever come across a situation where the failure of a condition to manifest itself during the presumptive period was relied upon as the basis for denial of the claim?

A. Oh, yes. If the disease didn't manifest itself until several years after service, then clearly service connection on a presumptive basis would not be warranted.

Q. And just because it's not warranted on a presumptive basis doesn't mean that the claim automatically should be denied; correct?

A. No. If sound medical judgment would show that the disability was present during service or that, as in the case of post-traumatic stress, some injury to the psyche occurred [173] during service, then service connection would be warranted on an incrred basis.

Q. Isn't it true that you come across situations where adjudication personnel have automatically denied a claim because of the failure to fall within the presumptive period, without considering whether or not it was a situation in which a link could be shown, let's say in the case of post-traumatic stress, outside the presumptive periods? In other words, they have determined that presumption is absolute, and if you don't fall within the presumption, they didn't look any further?

* * * * *

A. Yes, I understand your question.

I think that we have to look at this in a context of a time continuum. Before we had PTS, either you had a neurosis during service that was service connectable or you didn't get service connection. And either you had a psychosis during service or within the one-year presumptive period, or you didn't get service connection.

PTS gave us a whole new ball game. In effect, PTS said if you can prove a stressor during service, you have a lifetime presumption for PTS. And I used the word "presumption" erroneously. You trace it back to the in-service injury.

* * * * *

[179] Q. So you have been happy with all the instances—well, collecting all the instances in which you

have seen service representatives represent a claimant, you are happy with the representation they provided? You felt that in each instance it met a minimum level of competency. Is that correct?

A. Yes. They endeavored to obtain the evidence that was necessary. They had an understanding of the issues involved, and they had an understanding of the laws involved.

This is an education process for the service representatives. I think we have to bear that in mind. And we can't be too excessively critical of the performance that they render. They are human beings learning how to do their job, as rating board members are learning how to do their job, as attorneys would learn how to do it.

* * * * *

[189] Q. Now, in your earlier testimony you referred to the position of the legal specialist on the rating board.

How many legal specialists are there in the Northern California Regional Office of the VA?

A. In the VA Regional Office in San Francisco there are two legal specialists on the rating board, myself and a man by the name of the Dick Richards, who has been on the rating board since the 1950's.

Q. Is he trained as an attorney?

A. Yes. As a matter of act, he graduated from Golden Gate Law School in 1942.

Q. 1942?

A. Yes. Dick has been with the VA ever since World War II.

There is one other attorney, who had been a supervisor and now he's on the rating board for six months to learn how to do the work. And he went to Golden Gate night school with myself.

* * * * *

[190] Q. Apart from the individuals you have already named who are lawyers, a number of other people within the Regional Office have legal training; isn't that correct?

A. There are some adjudicators, not very many—I know of only two. One fellow passed the bar in Florida, and he's a GS-11.

* * * * *

[191] Q. Is law training a preferred experience for adjudicators and rating board members?

A. Well, in bygone years, 20 years ago you couldn't get into adjudication if you weren't a law school graduate or an attorney. But now college education is deemed satisfactory.

There have been efforts that I know of to hire attorneys. When I worked in the Philadelphia Regional Office, I trained a group of 12 attorneys who had just graduated from law school for—I trained them for three or four months as [192] adjudicators.

Q. Is Mr. Coil an attorney by background?

A. I understand that Mr. Coil attended law school, I believe, in South Dakota

* * * * *

[196] Q. Now, in general it is your perception, is it not, that attorneys request hearings more frequently than claimants represented by service organizations or claimants who represent themselves?

A. I have no opinion on that matter. I would say that the Swords to Plowshares, since they are attorneys, request a significant number of hearings, particularly before the Board of Veterans Appeals traveling board.

I have had hearings where the veterans were represented by attorneys. I've had cases where the veteran was represented by an attorney and they submitted written evidence.

But I think maybe you're correct. Attorneys do like to have hearings and go eyeball to eyeball and flush it out.

* * * * *

[200] Q. Have you ever received testimony from an expert witness at a personal hearing?

[201] A. Yes. I had one hearing where a doctor came in. It was the veteran's brother, but he was an M.D. And he came in and gave testimony.

I have known of people who have had hearings where psychiatrists came in and testified.

Q. Any other instances which you're familiar with where an expert testified.

A. No.

Q. I take it, then, experts are rather rare?

A. Well, their time is valuable, and they can do the same thing in writing.

Q. I believe you mentioned earlier in your testimony that, in your experience, claimants who do request a personal hearing frequently do not show up.

A. That's true.

Q. Have you gained an understanding as to the various reasons why claimants don't show up for hearings? Can you just catalog the reasons you have heard or explanations you have received?

A. Well, there's the usual, that they couldn't get off work or they couldn't get transportation, or this kind of logistical problem.

This is speculation, but I think that many of the claimants ask for a hearing when they're hot about the decision, and when it comes time for the hearing, they have cooled somewhat and decided against it.

Q. So they just deliberately don't show up?

A. Yes. And then also I think that some of the [202] claimants decide that, when it gets right down to having a hearing, that they don't have very much to say. Oftentimes the claimants will come in, and the service representatives will talk to them and decide that they don't want to have a hearing, because they don't have anything to say. But they'll think of some kind of evidence that can be obtained so that we can reconsider on the basis of some new evidence.

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VOLUME III

DEPOSITION OF THOMAS H. JACOBSON
NOVEMBER 2, 1983
(CAPTION OMITTED)

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[222] * * * * *

[A.] Then in 1978, on the December the 14th, 1978, the veteran filed a claim for service connection for leukemia as a result of radiation exposure.

Q. That's for chronic myelogenous leukemia?

A. Yes. The veteran stated that while assigned to the U.S. Air Force and checking nuclear weapons aboard aircraft and in other inspections of weapons as an intelligence officer, he was exposed to radiation.

Also he said he was exposed while assigned as a missile crew commander, when he had to make daily inspections of nuclear weapons.

Also the veteran stated that this leukemia was suspected in 1961, while on active military duty. However, an actual diagnosis was not made until 1978, when a bone marrow test revealed the presence of leukemia.

* * * * *

[229] Q. Then we have a rating decision dated August 14th, 1979, on the radiation claim?

A. Yes.

Q. Do you want to summarize that briefly? It's signed by Mr. Graham—

* * * * *

A. Well, the rating states that the issue is service [230] connection for leukemia. The facts are stated as being that the veteran contends his leukemia is the direct result of the radiation exposure that he has alleged, which we previously mentioned.

Then they go to say that the service medical records are completely negative as to any complaint, treatment or diagnosis of leukemia or radiation exposure during service. Post-service treatment records, they note, show the existence of leukemia in 1978.

In addition, they note that the veteran gave a history of being told about 15 years before that he had leukemia. However, there is no evidence to support this allegation.

And then they note that efforts to locate a record of radiation exposure during service have been unsuccessful.

Finally they state that leukemia first shown many years after retirement from active military duty is not related to service or to a service connected condition or shown to be due to radiation exposure.

So they denied the claim.

Q. And they deny the claim without having service records showing radiation exposure?

A. Yes. Then the veteran was informed of this decision by letter, apparently dated 9/11/79.

* * * * *

[233] A. Okay. Here is a letter from Mather Air Force Base to us.

Q. Dated October 22nd, 1979?

A. Yes. They're telling us that they still want the veteran's treatment records and that they have asked us four times but haven't received them yet.

Here's the veteran's Notice of Disagreement, dated 10/14/79.

[234] Q. What does it say? It's obviously written by the veteran.

A. Yes.

Q. And he says that he has been trying to obtain active duty medical records for ten months, with no answer whatsoever, and he refers to a request being made in December of '78, February of '79, May '79, and October '79.

A. And he points out that he believes that getting his military service medical records would be a vital part of his appeal.

* * * * *

[235] A. Yes. Now, on this form the veteran initially checked that he wanted to have a hearing, but then later he crossed that out and checked no, that he didn't want to have a hearing, and initialed it.

Q. Again, the appeal had been prepared by the veteran?

A. It appears so. There is no indication that it was done by anyone else. However, the veteran was represented by the Disabled American Veterans throughout this process, as indicated on the rating and the Statement of the Case.

Q. Well, it's true, is it not, that thus far in the [236] file, coming up from the bottom through this substantive appeal dated February 18th, 1980, we have seen nothing prepared by a service organization?

A. There was one letter here that was dated 9/13/79, wherein Mr. Poole, of the Disabled American Veterans, informed us that we hadn't told the veteran yet what our decision was, and the veteran was concerned.

Q. I'm sorry. With that exception, there is nothing that appears to have been written by any service organization?

A. No, not that I can tell.

* * * * *

[244] Q. What is the next significant item in the file here?

A. Here we have a letter from the veteran of December the 5th, 1980, where he withdraws his power of attorney that he had given to the DAV.

Q. And he says, "Due to the lack of a viable representation on the part of the DAV, I am withdrawing my power of attorney with your organization as of this date"?

A. Yes. This is a letter to the DAV.

Q. And you received, I guess, apparently, a copy of it?

A. Yes. Here is a letter from the veteran which came with that, dated 12/12/80, where he states he has withdrawn his power of attorney to the DAV and will take over responsibility for the claim himself.

Q. He asks for an audience with the VA to discuss the status of his claim and, quote, "what is needed to process it to a successful conclusion"?

A. Yes. I would take that to mean he wanted to have a hearing.

[245] Q. Okay. Now, turning again to the copy of the letter dated December 5th, 1980, from the veteran to the DAV, have you seen other letters like this, withdrawing the authority for representation?

A. Oh, yes.

Q. You have seen quite a number of them?

A. Oh, I wouldn't say quite a number. I would say I've seen some.

Q. What are the reasons that you have seen for withdrawing authority or consent to an accredited representative? Just catalogue the various reasons that people have given that you have seen.

A. Well, some are statements to the effect that they're not, in their opinion, being adequately represented. Sometimes I think the veterans and the service representatives get mad at each other, and they mutually decide that they want to work with someone else.

Q. Is it more frequently the case that they will substitute another service representative, or do they usually substitute themselves?

A. My experience has been that they will usually substitute another service organization. However, this man was an officer and felt that he could represent himself.

Q. Have you seen other instances in which the veteran has withdrawn his power of attorney in favor of a veteran's organization where he has chosen to represent himself in the future?

A. I have no present recollection of that. I'm sure I [246] have seen it. I've seen thousands and thousands of cases.

Q. Does the VA maintain any record of such complaints about the quality of the service representation locally, or are the letters referred to anyone for action, or—

A. Not to my knowledge.

Q. So there is no way in which such a complaint is really disseminated by the VA at the Regional Office level?

A. Not to my knowledge.

* * * * *

[251] A. Now, here is when I first saw the case. The case came to me, and I wrote a confirmed rating on October the 7th, 1981, which said that—

Q. It's on VA form 21-6789; correct?

A. Yes.

Q. Entitled deferred or confirmed rating decision?

A. Yes. And what I said was that the issue was service connection for leukemia and that evidence received as a result of the Board of Veterans Appeals remand did not establish entitlement to service connection for leukemia.

Q. Were you basing that in part upon the radiation exposure history document dated May 7th, 1981, received from Mr. Nelson?

A. Yes.

Q. The mere absence of dosimetry readings for the veteran does not conclusively indicate he was not exposed to radiation; correct?

A. I think that's a correct statement, yes.

Q. Because a lot of people didn't have dosimeter badges; correct?

A. Well, I really don't know that for a fact. That's my understanding. I can certainly believe it, considering my experience in the army.

Q. Did you make any attempt to determine whether personnel assigned to duties such as that of the veteran in this case were even given dosimetry badges?

[252] A. All of the development in this case we have seen and talked about, and nothing like that was done.

* * * * *

[257] Q. Then we have another BVA decision, do we not, with a cover letter?

A. Yes. This is the final decision. The previous one was a remand.

Q. That's dated March 8th, '82?

A. Yes. We might go through this.

First of all, they state the actions leading to the appeal. They talk about the remand. Then they catalogue the veteran's contentions, which we mentioned before. Then they determine findings of fact.

Then they state the law—

Q. First of all, the findings of fact, number three, doesn't that indicate to you that some service medical records were found which indicated white blood cell counts that were somehow abnormal?

A. Yes, it does.

Q. So there must have been some service medical records to that extent?

A. Yes.

Q. And that has not been reflected yet, has it, previously in the file in any location?

A. That was not shown in the original rating that we discussed on August the 14th, 1979.

Q. And it wasn't discussed in the original Statement of the Case?

A. I don't think so. Let's look.

No, there was no discussion as to that.

Q. And there was no discussion of that in the Supplemental Statement of the Case?

A. No.

Q. Do you have an explanation as to where that came from?

A. It came from the service medical records.

Q. It apparently had been missed by the Regional Office adjudicators?

A. Well, it hadn't been mentioned.

Q. If it had been located, such documents had been located, it would have been addressed, would it not? You would expect it would be addressed, would you not, in a Statement of the Case or a Supplemental Statement of the Case?

A. Well, the Regional Office might have seen it and might not have mentioned it; they might not have seen it.

The BVA goes on to point out that during many physical examinations and hospitalizations complete bloodcounts and [259] hematological studies were within normal limits. No bone marrow biopsies are shown to have been performed. At separation from service—pardon me. Hematology studies were within normal limits.

Q. Just getting back to Paragraph 3, if you had seen medical records which reported elevated white blood cell counts, you would have included that in the Supplemental Statement of the Case, would you not have?

A. Well, not unless those service medical records had been received after the BVA remand. I wouldn't have gone back and catalogued exactly what the service medical records had shown. That should have been done in the original Statement of the Case.

However, as we can see in this case, the original Statement of the Case merely says that service records were found completely negative as to complaint, treatment or diagnosis of leukemia or radiation exposure during service. And that's true.

But as they point out, there were instances of elevated white blood cell counts.

Q. And that relates to a type of leukemia, does it not?

A. That's my understanding.

* * * * *

MR. ERSPAMER: Q. As you sit here today, you have [260] no explanation as to why this elevated white blood count did not previously appear in either the rating decision, the original Statement of the Case or the Supplemental Statement of the Case?

A. No.

Q. Okay. Go on.

A. Then the BVA continues with the findings of facts. No. 8 says the leukemia was diagnosed in 1978, more than eight years after military separation.

Q. Why don't we just stop right there. You are familiar, are you not, with the fact that there is a latency period between radiation exposure and onset of diseases such as leukemia?

A. Yes, I am.

Q. And eight years is within the normal latency period associated with the gap between radiation exposure and manifestation of the disease?

A. Well, I think it would depend upon the level of the exposure.

Q. What is is [sic] the latency period for leukemia that you're familiar with?

A. I am not familiar with any definite standards.

Q. You have never seen statements like six to 15 years or six to 30 years?

A. No.

Finding of fact No. 10, the onset of leukemia is unrelated to any exposure the veteran may have had to low-level radiation during service.

[261] Then the BVA states the law in the case. It must be incurred during service or be shown to manifest itself to a degree of ten percent within one year after service.

Then the BVA goes through a discussion of the case. They state the obvious, that there is no evidence of leukemia in service. Apparently they didn't find the alleged medical opinion in 1960 either, or within the applicable presumptive period.

Then they say nor is the allegation that leukemia was diagnosed during service borne out.

Therefore, they say, the appeal must be considered on the basis of alleged radiation exposure.

* * * * *

THE WITNESS: Then the next paragraph discusses the veteran's allegation concerning radiation exposure. And they say that it is known that the exterior portion of nuclear weapons may emit very low-level gamma or gamma and neutron emissions at the immediate surface of the weapon.

MR. ERSPAMER: Q. Let me stop you right there. Do you know where they got that from?

A. No.

Q. It's certainly not reflected in any portion of the file we've seen so far, is it?

A. No.

Q. Okay.

[262] A. "Those rates diminish rapidly as one moves away from contact with the weapon. Evaluation of exposures to maintenance personnel who are required to work directly on exposed weapons has shown that these workers do not receive doses exceeding a significant fraction of the dose allowed individual members of the general public, as per federal guidelines."

Q. Let me stop you there. There is no evidence of any of that in the file, is there?

A. No.

Q. And there is no evidence of what the general public guidelines of permissible doses are in the file?

A. I think they're referring to acceptable radiation exposure levels. For a lifetime I think it's five rems. I believe it's in that document that I gave you last time I was here from the Defense Nuclear Agency.

Q. Oh, the Fact Sheet?

A. Yes.

Q. Okay.

A. In there it discusses the federal guidelines as to safe exposure to radiation.

Q. Would you consider the subject of the exposures of maintenance personnel who have worked directly on exposed weapons to be a relevant area of inquiry to adjudication of this particular claim?

A. Well, I think that—yes.

Q. This area of inquiry was not embarked on or conducted by the VA in connection with the adjudication of [263] this particular claim; correct?

A. That's correct.

* * * * *

A. Then the BVA goes on to say that in the veteran's case he was not among nuclear weapons maintenance personnel; and his access to nuclear weapons having been only incidental, [264] his exposure to low-level ionizing radiation would have been even less. Consequently, service connection is not warranted.

Q. Let me stop you again. How would you characterize the type of exposure the veteran claimed if it wasn't as a maintenance personnel, if we assume the BVA is correct here, that he wasn't part of maintenance personnel?

A. Well, he was a navigator, I believe. So he was on board the plane, and he said he was in a missile silo. And we have all seen the movies or movie clips of what it's like in the missile silo, where they have the atomic weapons.

Basically the BVA is recognizing his arguments and saying that they don't agree.

Q. Well, he says, does he not, in his statement which is attached to his letter of November 16th, 1981, which is the same as his statement in the substantive appeal—

A. Yes.

Q. —that during his career as a navigator and a combat intelligence officer and a missile crew commander, he came into contact with nuclear weapons, quote, almost daily? Correct?

A. Yes, that's what he says. Yes.

Q. And he said he was on flights carrying nuclear weapons for as long as 32-hour periods?

A. Yes, that's what he states.

Q. And he suggests that the possibility of leakage due to the altitude, pressure changes?

A. Yes.

Q. Do you think that the Board of Veterans Appeals' [265] characterization of his exposure as only, quote, "incidental" is consistent with the claims made by the claimant in this statement of the claimant we have just looked at? I mean, if that's true, if what he claims is true, do you call that incidental?

A. Well, under the law, the decisions of the BVA are final. That's how they saw it. I'm not going to argue with them. You can come to conclusions if you want.

Q. Well, I'm just asking, if you assumed that what he said was true, you wouldn't call that incidental, would you?

A. Well, I agree that even though the veteran was exposed, he was probably only exposed to low levels of radiation exposure. And I agree that the decision denying service connection is probably correct.

Q. But that wasn't my question. Do you want to answer my question?

A. Would I have used the word "incidental"?

Q. Do you think that properly characterizes—if you assume that what he said in that statement is correct, that exposure is more than incidental?

* * * * *

THE WITNESS: Well, it seems from the veteran's statements that it's more than incidental. I don't think I would use that word.

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DEPOSITION OF ALBERT MAXWELL
JUNE 14, 1983
(CAPTION OMITTED)

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[2] * * * * *

EXAMINATION BY MR. ERSPAMER

Q. Please state your full name for the record?

A. Albert Roland Maxwell.

* * * * *

[8] [MR. STOLL] The issue, as I understand it, before the Court is Mr. Maxwell's attempt to obtain representation in processing his veteran's claim. And all the of the factual background going into it is not relevant.

MR. ERSPAMER: Well, I think it is relevant to statutory entitlement to veteran's benefits.

MR. STOLL: No one has questioned that. As I understand it, it has been settled.

MR. ERSPAMER: Fine.

* * * * *

[35] Q. And while you were at Dr. Pepper Bottling Company, did you miss time from work due to injuries or diseases that you had suffered in the service?

A. Not very much there, but the boss knew and I knew I just couldn't do that kind of work. So then I went into the straight commissions work. So if I had to take time off from work, they didn't have to pay me.

Q. And starting from your discharge from the service in December of 1947, and up to the present day, have you lost a lot of work due to the conditions you described earlier, malaria and so on?

A. Mainly the last 10 years. Before that I was young enough I was able to work with pain. But the last 10 years I lost a lot of work and in the last five years, I lost probably 50 percent of the time.

Q. When is the last time that you have worked full-time?

A. It has been over two years ago.

Q. You are not currently employed are you?

A. No. In fact because of my finances, I tried to—I applied for a job at the Veteran's Hospital to work part-time three hours a day or weekends, and they gave me the job.

But I had to get a physical in order to be able to do the work and the doctors turned me down as unfit for employment, unemployable.

Q. When did that happen?

A. Probably April.

Q. April 1983?

A. Yes.

* * * * *

[39] MR. ERSPAMER: Q. Did you get any help from a service representative?

A. No.

Q. Did you receive representative [sic] at the time you prepared this?

A. No.

Q. There was none?

A. None.

* * * * *

[46] Q. And the next document, can you describe what that is? It dated March 30, 1959 from Mr. Kerry?

A. I got this from Mr. Kerry who was a service representative for the Disabled American Veterans in Salt Lake City telling me that my disability had been cut from 50 to 40 percent. They cut, I think it was five percent from malaria and five percent for my eyesight.

Q. Malaria or your scar?

[47] A. Oh, scar was also in that.

Q. And did you take any action to contest that reduction?

A. No, I didn't.

Q. Would you explain why?

A. Well, at that time I was employed and doing quite well and at that time I felt maybe that ten percent could better go to somebody else that needed it more than I did.

Q. Did you agree with there [sic] assessment with your disability?

A. No, because my eyesight was a lost worse than it had ever been.

Q. What your eyesight today tested recently?

A. Yes, in fact they asked me to go to the VA and get a eye exam and bring it back to them.

And I have a copy of the results here and I am considered 20/20 on my right eye and 20200 [sic] on my left which I am told makes it legally blind.

Q. How did your eye condition compare in 1959 to what it is now?

A. About the same.

Q. And had it deteriorated since the war?

A. Well, since I got out of service, yes.

Q. Did you have an attorney representing you at that time?

A. No, I didn't.

Q. Referring to the time, I am referring to the 1959.

A. No, didn't have anybody representing me.

Q. Didn't have a service representative either?

A. No, they just did that on their own, because I had signed the power of attorney with them to represent me and [48] they did that automatically.

Q. I see and did you have a personal hearing in 1959?

A. No, I didn't.

Q. And you never requested one I take it?

A. No, I didn't.

Q. And directing your attention to the next document which is Exhibit C to the complaint, which appears to be a letter from you to the Veterans Adjudication Board, Veterans Administration can you identify what that is?

A. Yes, on December 5, 1982, just prior to that, I filed a claim while I was in the hospital, multiple myeloma.

My wife had written a letter asking my compensation be increased because I was in the hospital and disabled.

Q. Let me stop you for a second. Is that separate from the previous claim filed for multiple myeloma?

A. No, same one. This is in November. And I was in the hospital for so long the date of my personal hearing came up only two or three days prior.

Q. When you got out of the hospital?

A. When I got out, so I went up to the DAV offices and talked to a Mr. Kerry and asked him to delay my personal

hearing because I didn't have time to prepare for it. And he made some notes and said would he do that.

Well, I waited and went back to the hospital, I waited and waited six or nine months and found out he hadn't done anything about it he had retired.

Q. He never notified you he had retired?

A. Never notified me, no.

[49] Q. And up to—what did you do then, is that this letter you wrote?

* * * * *

A. In answer to this, I have the letter I think that you have there that I wrote back.

Q. Okay I will hand you this stack and you can show me?

A. It is right here.

Q. Okay, that is the same letter, right?

A. Yes.

Q. Now, did you get a reply to your letter, to this letter that is Exhibit C to the complaint?

A. No, I did not. I went in and at that time they had a different service representative there, and about that time. Of course, we had made up our mind that we were moving to California, so I contacted the DAV here and that is when I first came in contact with the DAV representatives here in San Francisco.

MRS. MAXWELL: And we realized that we would have to do all this work ourselves and getting all of our records and everything that we needed to do.

THE WITNESS: This is when we started it.

MR. ERSPAMER: Q. All the other exhibit we went through and attached to the complaint were prepared after this date, December 5—wait I don't think they could have been. Let me check back here. Maybe they were. All of these were—

* * * * *

[50] Q. My next series of questions will be directed to before this time when you had all this substantiation prepared and will relate to Mr. Kerry.

What had Mr. Kerry done to develop the facts in support of your claim for multiple myeloma?

A. Absolutely nothing.

Q. And how many contacts had you had with Mr. Kerry?

A. Just two.

Q. Can you describe what they were and when?

A. Well, the first contact was after my wife had written a letter to the Adjudication Board asking that my compensation be raised because I was in the hospital and disabled.

Q. And then after I was able to, and after they turned down my claim, I went into the DAV to file for appeal and to get a personal hearing on it. And at that time he said he would do that.

Q. Mr. Kerry you are referring to?

A. Yes. He said he would do that and then we waited and waited to get some kind of an answer from him and after several months we went back in there to find out that he was not in office any more.

Q. And had you ever been interviewed by Mr. Kerry to get all the fact about your claim?

A. Just, he briefly asked me some questions when I went in [51] to file for the personal hearing.

Q. And how long did that meeting last?

A. Three or four minutes.

MRS. MAXWELL: And at that meeting, with him, I was with Al, he said, of course, you don't just write a letter, even though I had outlined everything and dated things, you don't just write a letter, this is ludicrous, you have got to produce some evidence, you have to get your records, you have to do this in detail. And then, he said—I said are you aware that Al was where he was, where his camp was located and he was exposed and he said no, I am not.

So we discussed that with him, and the fact that we were trying to locate someone that could substantiate that he was in the same camp with him that it would take us time to locate them and he said all right, I will see that this is taken care of.

He did make a phone call while he were in the office and typed something, a short paragraph and said all right, I will notify you—is the last, when he went back to the office

to check there was nothing filed in the office concerning that he had ever even be in.

MR. ERSPAMER: Q. Is that correct?

A. That is correct, yes.

A. And then at that time then I—we had made up our mind and discussed it and we have been moving here because our daughter lived there and we didn't have any other relations in Utah and we contacted the DAV here in San Francisco.

Q. I will get to that in a minute. I still want to [52] concentrate on the period before you moved to San Francisco.

So I take it no medical expert had been retained on your case?

A. No.

Q. No medical examinations had been performed by an independent medical specialist?

A. No.

Q. And none of the witnesses to your exposure had been interviewed?

A. No.

Q. Was anything done at that time—this point?

A. No.

Q. And had the Veterans Administration helped you or assisted you in developing facts in support of your claim at this point?

A. No.

Q. Had you had contact with anybody at Veteran's Administration directly let's say by phone?

A. Well, I contacted the VA representative at the hospital and what he said is just prepare a case. He said get it in writing.

Q. Did you have an idea of how to go about that at that time?

A. Not at all.

* * * * *

[53] Q. And now, again referring to the same period of time and before, had you consulted with any attorneys about representing than your claim?

A. Yes, before we started preparing this file, I contacted Richard Medsker. M-e-d-s-k-e-r.

Q. And he is a lawyer?

A. A lawyer in Ogden, Utah.

Q. And what did—for what purpose did you contact him?

A. I went in there to discuss this with him. He was handling some financial problems with me, so while I was there I asked him if he couldn't represent me an against the VA to get my pension increased.

Q. Let's take one question at a time. What prompted you to go to Mr. Medsker?

A. Because I didn't get any results from the VA or from the DAV.

Q. And did you feel competent personally to handle this whole process at the time?

A. No, because I didn't know what to do.

Q. Were you aware of the various government regulations [54] dealing with death and disability compensation?

A. No, I sure was not.

Q. Did Mr. Kerry seem to be aware of the various rules?

A. If he did, he never mentioned it.

Q. What did Mr. Medsker tell you when you asked him whether he could represent you?

A. He said I would love to help you Al, but I can't. I asked him why, he said it takes a lot of time and a lot of research and all you can pay me is $10 and he said I absolutely cannot take the time to do it.

Q. Was that the first time you learned of the fee limitation?

A. That was the first time.

Q. What was your reaction?

A. I was shocked. In fact I didn't believe him, so I went and a friend of mine gave me a book, I forget the name and I looked it up there and sure enough that fee limitation was in there. And later on, after I got to talking to Mr. Medsker, I found out that he encountered this same problem with his Father at that time he was trying to prepare some kind of a suit and or something for his father, but he said he couldn't take the time to do it, because he depends for his livelihood on paying clients.

Q. Did you ever make any further effort to contact any attorneys after you learned about the fee limitation?

A. Not right then, no I didn't.

Q. Why not.

A. Because I was sure that any other attorney if that were [55] true, which I didn't know, would have the same answer, I couldn't see anybody spending all that time doing all that research for $10. I know I wouldn't.

Q. And were you prepared to pay an attorney more than $10 to represent you?

A. Absolutely.

* * * * *

[56] Q. And can you explain whether or not you were satisfied with the representation afforded by Mr. Kerry?

A. Well, it goes without saying I was very, very disappointed because I didn't get anything from him, absolutely nothing.

I assumed that things were done that were not done and I wasted probably six to nine months that I could have been doing for myself because I thought it was being taken care of.

MRS. MAXWELL: When we sat in that office his reaction to Al and the way he was treated, he said, he made one statement, he said had you felt anything about this at all you would have appealed in 1959. And I did say, well, I wanted him to, but he didn't wanted to, but I mean his attitude was absolutely antagonistic negative and I told Al as we walked out of this office, I said he is not going to do anything for you.

And he said to me, it will be fine. He knows what he is doing and let's trust him and that was it.

[57] THE WITNESS: That is basically true. I mean, I felt that maybe we caught him hungry or something and just not in a good mood but that is basically what he said, that I should have started to rattle the chain in '59 when I was cut from 50 to 40 percent.

And as I mentioned at that time, I didn't feel I needed it and thought it would be better applied to somebody else that needed it.

MR. ERSPAMER: Q. And have you heard other veterans comment about the fairness of the fee limitation?

* * * * *

A. Well, yes, I have almost every day in any of the VA hospitals, you talk to veterans that are trying to get their compensation increased and they run up against a brick wall because they have no—they can't tell a service representative, well, you do this for me. If the service representative wants to do it, he will do it when he can get around to it.

At least if you had an attorney that was able to get a fee, you would feel he is working for you.

MR. ERSPAMER: Q. Well, did you personally have a feeling that the service representatives were not "Working for you?

A. Well, I think they do their best but they are far, far over worked, I know everyone I have been to has had stacks of cases waiting on their desks, three and four feet high and I just don't think they have the time to devote to it.

Q. What other service representative have you had contact [58] with?

A. A Mr. Parker, John Parker at the DAV office here in San Francisco and a Mr. Stan Lore, here at this office.

Q. I would ask you to describe the circumstances under which you met John Parker?

A. Yes, I had—the representative that took Mr. Kerry's place came and find out who was in change of this officer here and he contacted Mr. Parker and told me and I talked to Mr. Parker. When I came here to San Francisco he was the first person I contacted. He interviewed me first.

Q. How long did he interview you?

A. He interviewed me, oh, a good two hours.

And first he asked me why I came to him. And I mentioned the fact then that we were considering moving here to California, and so then he went ahead and interviewed me. And we were there I would say two to two and a half hours.

Q. When was this?

A. That was in January of 1983.
Q. So that was just five or six months ago?
A. Yes.
Q. And.
Q. Did you communicate with—up to that time had you ever had a personal hearing in front of the VA?
A. No. It was his recommendation that I have a personal hearing and have a medical examination.
Q. Okay. And I hand you what has been marked as Plaintiff Exhibit No. 20, can you identify that?
A. Oh, yes, this is the transcript from my personal hearing [59] before the Adjudication Board.
Q. And is Mr. Parker asking you the questions during that hearing?
A. Yes.
Q. Did you meet with him prior to that hearing?
A. Yes.
Q. How long did you meet with him?
A. Oh a good half hour to 45 minutes.
Q. That was in a addition to the two and a half hours you mentioned early?
A. Yes.
Q. Did you have any meetings with him in between those two times?
A. No, I had some various conversations with him on the telephone.
Q. Directing your attention to the transcript, there are a lot of corrections made in hand by pen.
Did you make those corrections?
A. No.
MRS. MAXWELL: The chairman did.
THE WITNESS: I don't remember what his name was.
MR. ERSPAMER: Q. Somebody on the local board or the Board of Veterans Appeals?
A. I think it was the chairman that did it.
MR. STOLL: Counsel, is this going to be an exhibit?
MR. ERSPAMER: It is an exhibit. It is Exhibit 20. It has been marked as Exhibit 20.
MRS. MAXWELL: There was a little note attached that the [60] chairman signed and he did say I have attempted to

correct in insofar as I can, I apologize for all the gramatical misspelings and so forth, I finally gave up on it.
MR. ERSPAMER: Q. Is that consistent with your memory?
A. Well, yes it is. The corrections made, he made them.
Q. Were you happy with the quality of the transcript?
A. Oh, it is awful. I think a 12 year old girl could have done a better job.
Q. Any gaps in the transcript?
A. Gaps where she could not understand—or could not spell a word, she left it out.
A. For instance, as an example, he said interned and she put he was "inturned." T-u-r-n-e-d.
That is all the way through it.
Q. Did you ask that the transcript be corrected in any way?
A. Well, he corrected it, he said as well as he could. But he told me if I requested it I could get a tape transcript of it, which I am proposing on doing tomorrow.
Q. To this point you have not requested a tape transcript?
A. I did, but have not received it.
Q. Who did you request it from?
A. From Stan Lore.
Q. That is your service representative?
A. Yes.
MR. STOLL: And he was Stan Lore that was referred to just a moment ago that told you you could get a transcript?
THE WITNESS: Yes.
MR. ERSPAMER: Q. And I believe you also stated he [61] recommended that you get a medical examine. Did you get a medical examine?
A. I did.
Q. And when did that take place, was that a—
A. At the same date as my—a day or so following the personal hearing.
Q. Okay and the personal hearing was held—I think I have it on the front page there of that—of my diary. I think I have it written there on top.
Q. January 19, 1983?

A. Yes. So my examination was probably the 21st or right in there.

MR. ERSPAMER: Can you mark this as next in order. (Whereupon, Plaintiffs' Exhibit No. 22 more particularly described in the index, was marked for identification.)

MR. ERSPAMER: For the record, Exhibit No. 22 is a—appears to be an undated letter from Mr. Maxwell to Mr. Stan Lore. I am handing you that, first to counsel, and it will come down to you in a minute—

While he is looking at that mark that as next in order.

(Whereupon, Plaintiffs' Exhibit No. 23, No. 24, No. 25 and No. 26 more particularly described in the index, were marked for identification.)

MR. ERSPAMER: Q. I hand you what has been marked as Exhibit No. 22, can you identify what that is?

A. Yes, this is a letter I wrote to Mr. Stan Lore, of the DAV, expressing my disatisfaction on my examination at the [62] Veteran's Hospital in San Francisco.

Q. And is the examination referred to in there a different exam than the one you testified about early that happened close to your personal hearing?

A. This is the same one. This is the 24th, I said the 21th.

Q. It was February 24?

A. Yes.

Q. And does that refresh your recollection as to the date of the exam?

A. Yes.

Q. What dissatisfaction did you have with your examination?

A. Well, I was under the impression it would be a very, very complete and thorough examination.

I went in there and the first person they sent me to was a psychiatrist and I went into his office and he sat me down and we talked probably for ten minutes, ten or 15 minutes.

And then I was sent over to the medical doctor and he had me take off my shirt and with the stethoscope he checked my heart and pulse and my blood pressure and then he started to ask me some questions.

He noticed I had my brief case with me and asked me if those were my medical records there. I said, "Yes." He said, "Do you mind if I see them?" And I said, "No." And I gave him a copy of my medical records.

And he look down through the medical records and he said, "My gosh, no use for me doing this work. It is all right here. It is documented and it is recent; no use of me [63] just duplicating that work."

Q. What was his name?

A. I don't know what his name was.

MRS. MAXWELL: It would be on record, I am sure.

MR. ERSPAMER: Q. Then what happened?

A. Well, he did give me—he checked my hemorrhoids and he checked my reflexes and had me bounce on one leg and he checked my heart and my lungs and my posture, and probed around my abdomen and he sent me for some X-rays. And that was it.

Q. And what more did you expect was going to occur?

A. Well, I thought that I would get a complete GI series upper and lower GI series.

I thought he would get a sample of my urine particularly on the fact that I had multiple myeloma and that he would give me a blood test, check my blood count, which he didn't do. He never examined my eyes. In fact he did very little.

Q. Anything else that you can recall at the moment that he didn't do that you expected he would do?

A. Well, he didn't really question me, at all on it, and I know because of his age he certainly was not old enough to have lived at that time and I am just of the opinion that he just didn't have any expertise at all on any EX-POWs diseases.

Q. Now, over the years have you ever been treated at the Veterans Administration Hospitals or private doctors or both?

A. Mostly the Veteran's Hospital. Two or three time I had emergencies where I had to go to a private doctor.

[64] Q. And how would you describe your experience with the diagnostic skills of the VA doctors?

A. Very good as far as they go, but they will not commit themselves to anything. I am sure that my doctor that I

have been going to the one there—been going to for the past years has saved my life.

Q. What doctor is that?

A. Dr. Jenson. He is the one that finally made them take a bone scan and bone marrow biopsy.

Before they discovered I had multiple myeloma, they were treating me for arthritis for six months to a year before that time. I got so bad I could not walk without a crutch or cane. But until recently, they would absolutely not document anything. I mean they would say that I had this, and these symptoms and these symptoms, but they were all symptoms. They would not say what caused them.

Q. I hand you what has been marked as Plaintiffs' Exhibit No. 23, can you identify what that document is?

A. Yes. I can—this document is—I had asked the doctor at various times what was causing my edema and he would not commit himself. So finally, I—this was after another document there by a Dr. Diess.

Q. Can you spell that for the reporter.

A. D-i-e-s-s

Q. The one marked as Plaintiffs' Exhibit No. 24?

A. Yes.

Dr. Diss is the head of the hemotology section at the Salt Lake Veterans Administration Hospital and Dr. Jenson, [65] would not state what was causing my edema because he said that should come from the hemotology clinic. So the hemotology clinic made this statement which is Exhibit 24, to the fact that my edema was not caused by my multiple myeloma and consequently after that then Dr. Jenson made this statement to the fact that he concurred with their findings and that my edema would be caused from some other cause rather than multiple myeloma and also he stated that—in fact along with this, I have a picture that I need to show you on that.

Q. Is that this picture here?

A. Yes, where it shows my right flank bulge which I have had complaints on, well, since 1947.

MR. ERSPAMER: Let's pause for a minute to have that marked as Exhibit 27.

(Whereupon, Plaintiffs' Exhibit No. 27 more particularly described in the index, was marked for identification.)

MR. ERSPAMER: Q. I hand you what has been marked as Plaintiffs' Exhibit No. 27. Why was it an issue as to whether your multiple myeloma caused your edema?

A. Because thay had differences of opinions between the doctors. Some of them figured my edema was caused by the multiple myeloma and Dr. Jenson was under the impression there had to be something else maybe in my kidneys or liver.

So he said it was not—it didn't behoove him to make a statement as long as the hemotology clinic didn't carry on file the fact it was not caused by myeloma and after they [66] made the statement he did this.

Q. Did you have a claim for service connection based in part on your edema?

A. And the fact of the right upperquandrant pains.

Q. And that is reflected in Plaintiffs' Exhibit No. 26?

A. Yes.

Q. And is that a copy of your signature that appears there?

A. Yes, it is. Now, this is what I—this is what I gave John Parker when I first came in with my claim but for some reason or the other, they didn't list only about a third of these problems.

Q. Who didn't list?

A. He didn't, to go before the board, personal hearing board.

Q. Which ones did he exclude?

A. Well, he never—muscle spasm was never mentioned. Chronic headaches, insomnia was never mentioned, edema was never mentioned, itchiness or swelling was never mentioned. Heyfever was never mentioned.

Q. Was that ever discussed with you?

A. Yes, it was discussed.

Q. Did you agree with that; not to submit those issues?

A. No. No. And that is it. And I have all of these documented to the fact that I did have them and the prescribtions [sic] that were given to me for them.

MRS. MAXWELL: The rash was mentioned, insomnia was mentioned by me when they interviewed me.

MR. ERSPAMER: Q. Well, were you unhappy with the fact [67] that he had not mentioned those conditions?

A. Well, I thought he had a reason for it. So I was trusting him for the fact that he had a reason but I didn't know what it was.

Q. He never explained to you?

A. No.

* * * * *

[78] Q. Now, I want to go into another area which is—again a little personal and that is your financial condition at the present time.

What are your current sources of income?

A. Well, I have $259 from the VA on a 40 percent disability rating and then I am on social security disability which is $558 and that is it.

Q. So you live on approximately a little over $800.00 a month?

A. Right. We exist. We don't live.

Q. And you find that it is difficult to make ends meet?

A. Almost impossible.

My wife is employed when she can be, but she does not feel like she can be away from me that much, because I have had times when it was fortunate that she was around.

Q. And how long have you had financial problems?

A. Well, it started about four years ago, four—five years ago when I started missing so much work.

I was self-employed, so I didn't have to answer to a [79] boss, but I had to take more and more time off work. So my income dwindled and dwindled and so did my assets. I had to dispose of my home and it went as far as—got down to where I had to take out personal bankruptcy.

Q. When did that happen?

A. About 18 months ago.

Q. Was an a Chapter XIII proceeding?

A. Yes. I went in with my attorney and asked him if I should not take out Chapter XI, he said absolutely not, no way you should take out XI, you take out Chapter XIII. There was no way I could have paid it back.

Q. Did you have debt associated with medical problems of your children?

A. Yes. Because of—the first, well, for instance, both Michelle—or both Paulette and Michael spent two-thirds of their lives in the hospital. Both of them.

Q. When did you finally pay off those medical bill?

A. Well, it is took me 15 years to pay off just my medical bills on those two children.

Q. Do you recall how much in magnitude they were?

A. No, I don't, but I paid $250 a month for it seems like forever and forever.

MRS. MAXWELL: For example, the first year of Paulette's life we had medical bills of $6,000.00 over what he made and had they not be treated in a Catholic hospital I am sure we would have been haunted to death. They gave us the recourse of paying it off as we could.

MR. STOLL: By the way I do not object to these lines of [80] questioning and I will withdraw my objection.

MR. ERSPAMER: The ones about income, you mean?

MR. STOLL: Yes.

MR. ERSPAMER: Q. Now, you said you had to sell your home. Did you have to sell other assets you had?

A. All my assets, I had several rental properties. I had quite a bit of land, recreational land and we had a place—summer place on a lake. We had to dispose of all of that and, of course, I had my toys. I had a boat and snowmobiles and which I used in my work.

Q. Did you have to sell all of those too?

A. Yes.

Q. Do you currently have any savings?

A. None.

Q. And do you rent right now?

A. Yes I have rented for the past three years.

And I had to move once because the rent was so high I could not handle it. So I had to move to a lesser place.

Q. Now, on or about 1970, or so, you filed an another disability claim in the Veterans Administration; is that right?

A. Yes. I was in the hospital, admitted to the hospital with some kidney problems and at the time, I filed to have

my compensation increased because of that and I was denied and I was given time to file an appeal but I didn't file and appeal, because at the time I got out of the hospital and I was again fully employed, so I didn't pursue it any further.

* * * * *

[81] MR. ERSPAMER: Q. Handing you what has been marked as Plaintiffs' Exhibit No. 28, is this the letter that you wrote, about reopening your claim in 1970 for a kidney condition. Again this is a document produced by the VA out of your file.

A. Yes. That is.

Q. Is that your signature there?

A. Yes, it is.

Q. Did you draft that?

A. Yes, I did.

Q. And that is the claim that you indicated was denied—

A. —let's see—

Q. —And without going into too much detail, is Exhibit No. 29 the notice of denial that you claim you received with regard to your kidney condition?

A. Yes.

Q. And do you recall Exhibit No. 30, which is the rating decision with regard to that?

A. Yes, that is correct.

Q. And Exhibit No. 31, is that your notice of disagreement dated January 18, 1981, disagreeing with their decision on your claim?

MRS. MAXWELL: You said 1981.

MR. ERSPAMER: I'm sorry.

[82] Q. 1971?

A. Yes, that is correct.

Q. Did you ever follow through with that notice of disagreement?

A. No, I didn't.

Q. May I ask you to explain why?

A. Well, I was released from the hospital and became fully employed and busy with my employment and I

couldn't at that time afford the hassle following it up. And at that time I was doing pretty well financially.

Q. So you just abandoned it.

A. Yes, I just abandoned it.

Q. Did you consult a lawyer before you abandoned it?

A. No, I didn't.

Q. So there was never an appeal?

A. No, there was not.

Q. And at that time you abandoned it, did you still have faith in the merits of your claim?

A. Oh, yes. In fact, I was hospitalized several times for the very same condition after that.

Q. And you did not bother filing a claim?

A. No, I didn't.

Q. And why didn't you bother?

A. I really don't know.

I guess I got tired of fighting the system.

Q. But, you—

A. But, you know, I didn't really pursue it vigorously until I had no other option because I had to because my [83] livelihood depended on it. At that time it didn't.

Q. Did you experience frustration in dealing with the Veterans Administration at that time?

A. Probably too much frustration. Probably if I had not been so frustrated maybe I would have pursued it and maybe something would have happened, I don't know.

Q. Well, has there ever been a time since you got out of Nagoya Camp No. 6 where you have been free from any physical ailment arising out of your interment?

A. Never. There have been times when I felt much better than other times. After awhile you learn to live with it. It becomes a part of your life, you can't dwell on it. You have to life [sic] with it, the same as if you have a bald head or scar on your right check or club foot, you learn to live with it and that is it.

* * * * *

[85] Q. Now, at some point in time did you try to obtain your service records from the VA?

A. Yes, the first time I did, I tried to file for an FHA loan and I asked for my military records, because I needed

a copy of my separation and my discharge and my enlistment records.

And I got back a form stating that my records had been destroyed at St Louis in a fire. And a couple of times since then I have requested other records and they have not been able to produce them for me. They told me they were lost or were in the first or destroyed or something.

Q. Was that the fire they had in St. Louis around 1973?

A. Yes.

* * * * *

[86] Q. And did you ever discover that your—or ever see any of the service records that the VA claimed had been destroyed in a fire at at [sic] later time?

A. I did on some of them, yes.

Stan Lore had some that I had never seen that I had requested.

Q. And when was that? Was that this year?

A. Yes. He sent me—I asked him to send me a copy of all of them, and he did and there were somethings I had never seen.

[87] But I still have never been able to obtain a copy of my original discharge.

Q. Did you have any of trouble proving that you were there in the prison camp?

A. Oh, no. They evidently have evidence of that, because they always accepted that.

Of course, they could not very well otherwise, because they have records of me being in Madigan General Hospital and Camp Carson, Colorado, and I requested the record for that and they were not able to get them but Stan had them.

MRS. MAXWELL: Other medical records to reproduce, around 1965 my daughter tells about, I think between '65 and '66 he was hospitalized on and off for almost three months' time, during which time his white count was well over 100,000 and I was advised to go to work by the doctors because they thought he had leukemia at that time.

Then the white count returned to normal and they told us it was not a possibility but a probability that he was—definitely had some kind of blood disorder and our family physician said, "I tell you that within 19 years. . . ."

—this is when he first examined him— ". . . of this date you are going to find that he will have problems related to that exposure and probably in some form of a cancer."

Of course, we had no idea it would be something like this, but we cannot get copies of that.

MR. ERSPAMER: Q. You have not been able to get copies of the records showing the leukemia count?

A. When I go they say this is all we have. They don't say [88] they have lost them.

Q. What hospital?

A. The VA. The same one.

Q. In Salt Lake City?

A. Yes.

Q. And how many blood tests did you have in that series when you had the high blood count?

A. Oh, I had to come back about two or three times a week for a period of 90 days.

Q. And to date you have never seen those medical records?

A. No.

Q. And the VA has been unable to produce them; is that correct?

A. Right, and we asked the doctor who treated me and he said I really don't remember because the doctor is still there.

Q. And have any of your doctors told you that would be related to your claim for multiple myeloma?

A. No, in fact no doctor stated that until Dr. Lammabert stated it and from then on I am getting some positive statements.

Q. Has any VA doctor told you that your multiple myeloma is perhaps associated to your exposure to radiation in the service?

A. No.

* * * * *

[91] Q. Now, based upon your experience in the Veteran's Administration, do you agree or disagree with the statement that the Veteran's Administration adjudication process is non-adversarial.

* * * * *

MR. ERSPAMER: Q. In what sense is the VA process adversarial?

A. Well, I understand, according to all the VA literature I have read, that any benefit of the doubt should go to the veteran. But I have not gotten any benefit of the doubt.

They know that I was there. And know the bomb was dropped and know that I was exposed and they have probable cause to think that my myeloma might have been caused by that. But I have not been given any benefit of the doubt or any consideration whatsoever.

They just plain say that it is denied on the basis that I can't prove it was caused by my exposure to radiation. Even though I have a statement from an expert-in-which she claims beyond any reasonable doubt that she is convinced that is what caused my myeloma.

Q. Has the VA ever referred you to a expert hemotologist for an opinion on the causation?

A. No, not to the causation, never.

Q. Have you ever had any problem in getting responses to mail or letters you sent to the Veterans Administration?

A. No, I get responses, not the ones I want, but I get responses. Yes.

* * * * *

[122] Q. Now, approximately in 1970, you sought an increase in your disability rating from above 40 percent?

A. That is correct.

Q. And that was based on the medical condition—

A. I was in the hospital having a problem with the right upper quadrant pain and I was hospitalized for quite sometime and I did file for an increase in my compensation at that time.

Q. About how long were you hospitalized; do you recall?

A. A couple of weeks.

MRS. MAXWELL: Well, he was admitted in emergency at a civilian hospital and transferred to the VA and our family physician took care of him for the first few days and then he was transfered to the VA.

MR. STOLL: Q. And approximately how long was it—after you were released from the hospital, did you return to work?

A. Just two or three days.

Q. Did you work fairly steadily after that?

A. The same as before; worked awhile and had to take some time off.

Q. So in 1970, you were nonetheless able to return to work after that?

A. Yes. Yes. I was.

Q. On roughly the same basis you had be [sic] working for the previous—

A. —yes.

Q. And that was reason that you abandoned your claim for [123] any increased benefits.

A. Yes, that is correct.

VOLUME I
DEPOSITION OF RICHARD B. STANDEFER
June 15, 1983
(CAPTION OMITTED)

[3] * * * * *

EXAMINATION BY MR. RAM

MR. RAM: Q. Would you state your full name for the record, please.

A. Richard B. Standefer.

* * * * *

[5] Q. And from 1970 on, you have been associated with the Board of Veterans Appeals.

A. Yes, I have.

Q. And you are presently the Deputy Vice-Chairman of the Veterans Board of Appeals.

A. That is correct.

* * * * *

Q. Could you briefly describe your duties and responsibilities as the deputy vice-chairman of the Board of Veterans Appeals?

A. As I point out here, I do supervise all aspects of what we call one appellate group. That would be nine of the 18 sections of the Board.

[6] The chief members of those nine sections report to me. I am not directly involved and I don't influence the decision-making process as such.

I do have authority to hire, fire, discipline, reassign attorney advisors who work for the Board.

I give technical advice and assistance to attorneys, chief members, medical and associate law members of the Board.

One important aspect of my job is what I would characterize as quality control of decisions of the Board.

* * * * *

[31] MR. RAM: Okay. Counsel, could the witness have your copy? Thank you.

I will read it beginning on page 2.2 of Plaintiffs' Exhibit No. 43 (Standefer Deposition), which is Change 16 to the MBVA-1, under Section 2.05a, it states that, "The senior attorney prepares decisions on extremely complex and controversial appeals stemming from personal hearings held before a section of the Board in Washington or before a travel section in the field office."

Q. Could you give me an example of an extremely complex and controversial appeal?

A. Generally speaking, a multiple sclerosis case can be called extremely complex and controversial.

Q. Why is that?

A. Because signs and symptoms of multiple sclerosis can anticipate any number of other diseases.

There is a seven-year presumptive period for the allowance of service connection in a multiple sclerosis case, when there are manifestations identifiable as being manifestations of [32] multiple sclerosis which emerge during that seven-year presumptive period.

There could be conflicting medical testimony which has to be sifted—some doctors think one thing and some doctors and expert witnesses think another, and it takes an experienced attorney then to sort all those kinds of things out.

Q. Are multiple sclerosis veterans usually represented by attorneys?

A. Usually they are not represented by attorneys. They may be in an instance or two, but generally not.

Q. What is it about an experienced attorney that would enable him to sort out the complex problems of medical proof in a multiple sclerosis case?

A. Well, his skills of sifting the evidence, of course, would develop in years of experience with the Board in doing that very thing, one becomes a good advisor and intimately familiar with the rules and regulations. One develops a facility for—of evaluating various items in the claims folder and one develops the skill to communicate more effectively in writing, to prepare findings of fact and conclusions of law, just through practice—through years of sticking at the job and gaining the experience.

Q. Why does the BVA use attorneys to perform the duties that you have described, for example, sifting through evidence and preparing findings of fact?

A. We feel their legal training better enables them to do that function.

Q. By their legal training, would that include going to law [33] school?

A. Of course. That is what I mean precisely, law school and bar membership.

Q. Still looking at that language that I read to you from Plaintiffs' Exhibit No. 43 (Standefer Deposition), talking about "complex and controversial appeals," can you give me another example in addition to a multiple sclerosis case?

A. Some other complex cases we get are purely cases of a legal nature, wherein there may be a contest among two putative widows, each claiming to be the legal widow of a deceased veteran and hence entitled to survivor's benefits.

Under VA rules and regulations, only one person can be paid as the deemed valid widow.

There may be complex determinations wherein marital relation conflict laws among several jurisdictions have to be resolved and those can be very complex cases.

Q. And what would be complex in those cases would be the law, whereas in the multiple sclerosis cases you have complex medical and factual issues.

A. That is correct.

Q. In the cases that you have just described in which, for instance, you have two putative widows, as you have described them, who are the two widows usually represented by?

A. Most of the time they would be represented by service organizations.

Q. Similarly, in multiple sclerosis cases, the veteran will usually be represented by a service organization?

A. Yes, and that, of course, is our experience generally at [34] the Board, most claimants are represented by service organizations.

Q. Would you give me a third example of an extremely complex and controversial appeal?

A. Radiation cases often are extremely complex and controversial.

Q. Why do you say that?

A. Again, because the medical issues generally are very involved.

There is a great deal of controversy as to the latent semetic effect of low level of ionizing radiation.

There may be subtleties of evaluating and weighing credibility of conflicting expert testimony.

Q. And this is the type of thing that an experience attorney would be best at doing?

A. Yes. Yes.

* * * * *

[105] Q. You have testified to a procedural rule that a substantive appeal must be filed within 60 days of the Statement of the Case, but after that 60-day period, until a year has expired from the notice of the decision, the substantive appeal may still be filed.

Is that rule apparent from the first page of Plaintiffs' Exhibit No. 61 (Standefer Deposition); and specifically, is that one year from the notice of decision rule apparent from the first page of Plaintiffs' Exhibit No. 61?

[106] A. No.

Q. Is that rule apparent at all from the entire exhibit, Plaintiffs' Exhibit No. 61 (Standefer Deposition)?

A. Well, in this particular case, one might argue—I am not trying to give you a forensic reply to what is a straightforward question, and I think I will just answer, no, it is not apparent there.

Apparently, in looking at the Statement of the Case given to this claimant, I would probably know about that, because this involves a case wherein the originating agency had entered a decision, and that decision had not been appealed within one year.

And that is what the entire thing is about, whether there is new and material evidence involved.

But this would just be an unusual situation. You picked a poor example in this case.

Q. Well, I will represent to you that Plaintiffs' Exhibit No. 61 (Standefer Deposition) is a form letter that is sent to—

A. Precisely.

Q. —everybody who files a notice of disagreement, regardless of whether there was something in the case involving the one-year rule. And you would, I presume, answer

that it would not be apparent to the people who receive this Plaintiffs' Exhibit No. 61 (Standefer Deposition), that in addition to the 60 days to file their substantive appeal, they also have the year from the time of the notice of decision; is that right?

A. That is correct.

* * * * *

[110] Q. Have you ever heard of a claimant who thought he had a meritorious case, but failed to file a substantive appeal because he thought he would not receive justice from the VA?

A. No one has ever told me that directly.

Q. Have you ever heard of that indirectly?

A. Sure. Of course. Everyone knows lots of claimants are frustrated with the process and the system.

Q. Could you elaborate on that? What do you hear about claimants being frustrated with the process and the system?

A. Well, all you have to do is pick up a newspaper these days and see how hot and emotionally charged certain areas of our practice have become. And specifically, the Agent Orange issues, to some extent, radiation exposure issues.

* * * * *

[111] Q. What do you hear was the reason given as to why a veteran might have given up? You said not because the system was too complicated, implying there was some other reason that you heard.

A. There are certain veterans who are extremely alienated and have given up on the system, and again, all one has to do is pick up a newspaper to know that.

* * * * *

[122] Q. Then 34.4 percent cases allowed on cases heard by the traveling board, and 13.9 in cases heard by the field office rating board, and then 12.9 percent of the cases allowed where there was no formal hearing.

Can't you conclude from those figures that appellants who request and receive a formal hearing are generally much more successful than those who don't?

A. I think that is a fair conclusion.

* * * * *

[126] MR. RAM: Q. Why do so many claimants waive their right to a hearing?

A. Well, again, for the reasons I have described earlier: to attend a hearing necessarily involves some time and effort.

Q. No other reason that you can think of?

A. Again, I have given this answer earlier: Many times, I think perhaps a claimant feels like all relevant information has already been made a part of the record. There is no amplification that needs to be made in terms of a personal appearance and hearing.

Q. But you can look at Plaintiffs' Exhibit No. 63 (Standefer Deposition) and see that the cases in which hearings are requested, the claimant is generally much more successful.

A. That is correct. That is what the figures would seem to show.

Q. Does the VA do anything to discourage claimants from invoking their right to a formal hearing?

A. Absolutely not.

MR. RAM: Why don't we take a short break.

(Whereupon, a recess was taken.)

[127] MR. RAM: Back on the record.

May I approach the witness? I have an exhibit from the complaint and I have not made copies of it.

MR. NAGAN: Surely.

MR. RAM: Q. Mr. Standefer, this is Exhibit H to the complaint that the plaintiff filed in the case on April 13, 1983, and it is a letter from the local VA in San Francisco to Mr. Reason Warehime, Jr.

A. All right.

Q. Exhibit H reads—and I am reading from the second paragraph now—I guess I will read the whole thing and stop—this is from T. A. Verrill, Adjudication Officer in San Francisco.

"Dear Mr. Warehime:

"We have your substantive appeal wherein you indicated you wanted a personal hearing.

"You are, of course, entitled to a personal hearing. It is, however, our responsibility to advise you of certain facts. First, due to the backlog of scheduled hearings, it would be most likely several months before a personal hearing could be held, and with the time allowed for typing the transcript of the hearing, it could result in a substantial delay in submission of your appeal to the Board of Veterans Appeals in Washington, D.C."

Looking at that first reason that I have just read, which begins, "First, due to the backlog of scheduled hearings," do you think that a claimant reading that would be less inclined to request a formal hearing?

[128] A. Not necessarily, not if he really wanted a personal hearing, I don't think that would discourage anyone.

Q. But all things being equal, wouldn't that sentence I have just read make him less likely—less likely to have him ask for a formal hearing?

MR. NAGAN: I think the question has been asked and answered.

MR. RAM: I don't think I am harassing the witness, and asked and answered is not an objection in a deposition.

Q. All things being equal, wouldn't reading that sentence that I have just read to you, which talks about the backlog of scheduled hearings, and how requesting a hearing will delay the process, wouldn't that sentence make a claimant less likely to ask for a personal hearing?

A. Well, again, I think the only answer I can give you is that sentence apprises the claimant of certain facts that there will be some delay if he wants a hearing.

If he wants a hearing, though, I am sure the claimant would come ahead and have his hearing.

Q. You still have not answered my question. My question is:

All things being equal, when reading that or wouldn't reading that sentence make a claimant less likely to request a personal hearing?

A. What do you mean "all things being equal"? What does that modify?

Q. Assume that this sentence that I just read to you was not here, wouldn't in that instance the claimant be more likely to ask for a personal hearing?

[129] A. I don't know if he would or not.

Q. Isn't that sentence inconsistent with the due process right of the claimant to a hearing?

A. It is not in my opinion.

Q. I will read the next sentence:

"Secondly, a personal hearing in the Veterans Administration Regional Office, San Francisco, would be before the local rating board which has evaluated your case previously, not the Board of Veterans Appeals personnel."

Isn't that sentence designed to discourage the claimant from requesting a personal hearing?

A. It is designed, administratively I would suspect, to inform a claimant of certain facts, that a claimant who has just frivolously, without really intending to make his appearance, should understand exactly what is involved when a personal hearing is requested.

But someone who genuinely wants a hearing on an appeal, I don't see that as being language that would discourage anyone from pursuing that course of action.

Q. And you don't consider that sentence at all to be inconsistent with the due process right to a hearing?

A. I certainly don't.

Q. And you consider that sentence to be perfectly consistent with the due process right to a hearing?

A. Yes.

Q. You also consider the first sentence that I read to you which states, "First, do to the backlog of scheduled hearings, it would be most likely several months before a personal hearing [130] could be held, and with the time allowed for typing the transcript of the hearing, it could result in a substantial delay in submission of your appeal to the Board of Veterans Appeals in Washington, D.C."

You also consider that sentence to be perfectly consistent with the due process right to a hearing?

A. Yes.

Q. You don't think that would discourage a claimant one bit from requesting a hearing?

A. Obviously what this letter is designed to do, is to, as I have said before, inform any claimant, I—well, I have no idea. Is this a form letter or what? I am assuming—my assumption is, now, that this is a form letter sent to all claimants, and whether or not that is true, I don't know.

But if it is, then probably the situation—the regional office involved with it has confronting it a situation where lots of personal hearings are scheduled, and people do not appear for the personal hearings.

This then is meant to inform claimants of exactly what the situation is; what kind of backlogs are facing the regional office, and to ask people if they really are not seriously interested in having a personal hearing, they can speed the claim along by not following their request for a personal hearing.

But I don't see this as trying to discourage somebody who really wants to exercise their fundamental right to a hearing, from having one.

Q. So you agree this letter is designed to cut down the [131] number of claimants who request a personal hearing?

A. Well, it is designed to cut down on the number of claimants who request a personal hearing, and then don't show up for them.

MR. RAM: All right. May I have the question read back? (Question read.)

MR. RAM: I still don't think you answered that question.

Q. Referring again to Exhibit H, the sentence that begins, "First, due to the backlog of scheduled hearings," are you saying that you don't think that sentence would discourage a claimant one bit from requesting a hearing?

A. I just don't see—I think what you want me to do is answer yes or no, and the question can't be answered yes or no. That is not fair. It is misleading for me to answer yes or no, and I have tried to amplify what probably, as I understand it, is the purpose for that letter.

That letter is meant to discourage people who do not genuinely, seriously want a hearing on appeal.

It is not meant to discourage someone who does—it gets at this kind of thing—somebody who requests a hearing is scheduled for the hearing, and the case then sits at the regional office level for months awaiting the hearing. Then the date of the hearing comes and the claimant does not show up for the hearing. That is that much time that has been lost because of that.

This is not meant to discourage a claimant who wants a hearing, has it scheduled, and appears and testifies.

Q. I will keep reading from Exhibit H. The next sentence says:

[132] "Thirdly, certified statements carry as much weight as in-person testimony."

Wouldn't that sentence tend to discourage claimants from requesting a formal hearing?

A. Again, it just informs the claimant of what is indeed true: certified statements carry as much weight as in-person testimony.

Again it is a—it is the option of the claimant as to whether or not they want the hearing.

MR. NAGAN: Counsel, I believe you have copies of that exhibit.

MR. RAM: Right. I will enter the exhibit. What I have been referring to is Exhibit H to the complaint. We will mark that as the next exhibit in order, which is Exhibit No. 64.

[Whereupon, Plaintiffs' Exhibit No. 64 (Standefer Deposition), consisting of an updated letter to Mr. Reason Warehime, Jr., from T. A. Verrill, Adjudication Officer, was marked for identification.].

MR. RAM: Q. Mr. Standefer, I will again direct your attention to the sentence in the exhibit which has now been marked as Plaintiffs' Exhibit No. 64 (Standefer Deposition) where it states, "Thirdly, certified statements carry as much weight as in-person testimony."

And I will ask you, isn't that inconsistent with the figures in Plaintiffs' Exhibit No. 63 (Standefer Deposition) for disability compensation cases allowed, that show cases in which formal hearings are requested result in more allowances?

A. The figures speak for themselves.

[133] As is reflected here, where personal hearings are conducted, the claimants, in a larger percentage of cases, tend to be successful.

However, under the law, in-person testimony has the same weight as other testimony.

The law does not differentiate and indicate to anybody, any adjudicator, any official at the Board of Veterans Appeals that more weight, more credibility is to be given to face-to-face testimony.

Q. Well, it may not be written down, but in fact, don't the figures in Plaintiffs' Exhibit No. 63 (Standefer Deposition) show that you are better off going in there and in speaking to people at a formal hearing, rather than just submitting a certified statement?

A. In a broad range of cases that is true. But that does not speak to an individual case, of course.

Q. Still looking at Plaintiffs' Exhibit No. 64 (Standefer Deposition), I will read the next sentence.

"Fourthly, if you do not have new and material evidence, preferably medical, but would be merely restating previously furnished information, no change can be made based on the personal hearing alone."

Doesn't that sentence also discourage claimants from requesting formal hearings?

A. Again, I would think that anyone who genuinely wants a hearing on appeal would not be discouraged by any language in this letter.

Q. Well, Mr. Standefer, looking specifically at that line, [134] that sentence I just read, which is the last sentence in the second paragraph, doesn't that sentence say unless you have some new evidence, there is no point in a formal hearing? Isn't that what that sentence says?

A. All this says to me is that the rating board is unlikely to reverse itself.

Again, what you have to understand is the rating board members act only as hearing agents for the Board of Veterans Appeals. So whereas the—this kind of language may indicate to the claimants that they are not apt to change their minds unless new and material evidence has been submitted, this does not speak at all to what the Board of Veterans Appeals is apt to do.

Q. With reference to a personal hearing before the rating board, doesn't that last sentence which begins with the word "Fourthly," say that unless you have got some new evidence, there is no point in asking for a personal hearing in the field office?

A. Where are we now? Ask the question again.

MR. RAM: Do you want to take a break?

THE WITNESS: Yes. Let's go off the record for just a minute.

(Whereupon, a brief recess was taken.)

(Question read.)

THE WITNESS: And again, it says to me that the local rating board may not be inclined to change its mind.

It does not say there is no point in asking for a hearing on appeal.

[135] The hearing on appeal is for purposes of the Board of Veterans Appeals, and we are not addressing that point at all in this last sentence.

Q. I am talking about the personal hearing in the field office.

A. I know you are, and that is why I say it seems to [sic] that I have responded to your question.

Q. Okay. But my question was just with respect to the personal hearing in the field office, doesn't that sentence that begins with "fourthly" say there is no point in asking for a personal hearing in the field office, before the case is certified to the BVA, unless you have some new evidence?

A. Except the claimant knows that the hearing in the field office is for the purposes of making a transcript which is going to communicate to the Board of Veterans Appeals. The claimant knows that the appellate process is not trying to change the rating board's mind. The appellate—the hearing on appeal is for the purposes of—using the rating board members as agents of the Board of Veterans Appeals, and of making a transcript and getting anything into that transcript that the claimant so chooses to, that the Board of Veterans Appeals can be communicated with; can read the transcript.

The claimant knows that his right of appeal is not contingent on convincing the rating board to change their minds. He has to convince the Board of Appeals to overturn the rating board decision.

Q. What is the purpose of a personal hearing that is the subject of Plaintiffs' Exhibit No. 64 (Standefer Deposition)?

[136] A. It is to allow the claimant the opportunity, in an informal setting, to present any information, any evidence that is relevant to his claim, without being bound by exclusionary restrictive rules of evidence.

The members of the rating board then sit as agents of the Board of Veterans Appeals for administrative purposes of opening the hearing, closing the hearing, asking whatever questions may occur to them.

They are there to the extent possible to assist the claimant, not to impede him in his effort in any way.

Q. And as a result of the personal hearing in the field office, there is a transcript that goes to the BVA in D.C.; is that right?

A. That is right.

Q. Doesn't that last sentence in the first paragraph say, if you don't have new evidence, but would be merely restating previously furnished evidence, there is no point in asking for the personal hearing in the field office?

A. That is not what it says.

It says, "No change can be made based on the personal hearing alone."

It means the rating board is not inclined to make any change based on that personal hearing alone.

Q. Doesn't it also mean that the BVA is not inclined to make any change based on the personal hearing alone?

A. Of course not. There is no way that can be read that way.

Q. Where in that sentence that begins "fourthly" does it limit what it is referring to, to action taken by the field [137] office?

A. There is no explicit language that I can point to that would answer your question.

It is quite obvious, I think, to any person who would read this, that the regional office is speaking of itself alone, and

is not indicating that the Board of Veterans Appeals is not going to be able to allow the claim, or is going to be disinclined to allow the claim, based on the personal hearing alone, personal testimony given at a hearing alone.

Q. If on the basis of reading this letter which is Plaintiffs Exhibit No. 64 (Standefer Deposition), the claimant decides not to ask for a personal hearing in the field office, is he going to subsequently be able to ask for some type of formal hearing?

A. Yes.

Q. Isn't one of the types of hearings he could ask for, a hearing in the field office, to make a record for the BVA?

A. That is correct.

Q. And isn't this letter which is Plaintiffs' Exhibit No. 64 (Standefer Deposition) apt to make the claimant think that no hearing in the field office is going to make a difference with his case, unless he introduces new evidence at the hearing?

A. Well, I think the plain language would indicate just what any person reading it could gather, and that is if the claimant is there without new and material evidence, preferably medical, and is just going to restate previously furnished information, no change is apt to be made at the local rating office level.

* * * * *

[157] Q. If the BVA accepts as to every fact in the statement of the case that exception was not—that was not explicitly disagreed with by the claimant, wouldn't that prejudice the claimant's appeal?

A. I just don't know what you mean by that particular language, wouldn't that prejudice his appeal. I don't know what you mean.

Q. Wouldn't he be less likely to prevail?

A. Yes, that is true.

Q. Isn't it true that many unrepresented claimants, and many claimants represented by service organizations file one page substantive appeals that do not respond point by point to the fact in the statement of the case?

A. That is true.

* * * * *

[159] Q. Is the claimant's appeal limited to whatever issues he raises in the substantive appeal?

A. Ordinarily the Board of Veterans Appeals will assume jurisdiction only of matters that are raised in the substantive appeal.

Q. So anything not raised in the substantive appeal is waived; isn't that right?

A. Many times the Board of Veterans Appeals will take the posture that issues that are not responded to specifically in the substantive appeal, are considered dropped.

And that is also pointed out in a preliminary paragraph in our decision notice, to put the claimant on notice that if [sic] wants to pursue those matters, that he should do so at the regional office level.

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VOLUME II
DEPOSITION OF RICHARD B. STANDEFER
JUNE 16, 1983
(CAPTION OMITTED)

* * * * *

[164]

Q. Isn't it true that almost none of the service organization representatives are attorneys?

A. To the best of my knowledge, that is true.

Q. And that includes the staff at the national offices, doesn't it?

A. When you say the "staff at the national offices," can you clarify precisely what you mean? Are you talking about the appeals staff that are actually headquartered and housed with the Board of Veterans Appeals in our building; or their national headquarters like over in other parts of the city in Washington?

Q. Well, let's take it one at a time. First, the appeal staff housed in your building; isn't it true that almost none of them are attorneys?

A. That is true.

Q. Isn't it true that almost none of the service organization representatives headquartered elsewhere in Washington, D.C., are attorneys?

A. Well, as far as their national organization—national [165] staff skill, I don't know. There may be some attorneys that work for the national organization's national staff. I have no knowledge about that, but I think these would not be service officers as you using that word.

Q. All right. Now, when I say service officers from now on, or service representative, I am going to mean service organization representatives who are accredited to appear before the VA.

Now, with that definition in mind, isn't it true that almost none of the service officers at the national offices are lawyers?

A. To the best of my knowledge, that is a true statement.

Q. Isn't it true that almost none of the service officers in the regional offices are lawyers?

A. To the best of my knowledge, that is true.

Q. Isn't it true that almost none of the service officers at the local offices are lawyers?

A. To the best of my knowledge, true.

* * * * *

[166] Q. Isn't it true that in general the claimant does not meet his Washington, D.C., service representative until shortly before the hearing?

A. To the best of my knowledge, I think that is true.

* * * * *

[168] Q. And isn't it true that in those ten or so times the claimant did not even meet his representative at all?

A. I have no idea. I would suspect not.

Q. You would suspect that he did not?

A. That he did not meet the representative.

Q. Are you drawing a distinction between a formal hearing and some other type of hearing?

A. Yes. Isn't that what we are talking about; a formal hearing?

Q. Okay. What other type of hearing is there?

A. Well, that is the only kind of personal appearance that is—where either the service officer comes and talks directly, face-to-face in a formal hearing situation where the presiding members call the hearing to order and so forth. A formal situation is what I am talking about.

I am not talking about—and I trust you are not talking about a—about what we call an informal hearing memorandum, which is nothing but a written document.

Q. Is an informal hearing memorandum different from the statement of the accredited representative?

A. No, it would essentially be the same.

Q. It would be the same?

A. Right.

[169] Q. And it would be a one or two page written document?

A. That is correct.

Q. And what percentage of appeals are handled simply through an informal hearing memorandum?

A. The vast majority.

Q. Isn't it true that in cases in which the appeal is handled simply by an informal hearing memorandum, that the claimant often does not meet his service representative at all?

A. That is true.

* * * * *

[170] Q. But isn't it true that almost always it is the case that the service representative does not gather evidence?

A. That is not the service officer's primary function. That is correct.

Most of the time they don't go out and try to develop the evidence on their own.

* * * * *

[171] Q. In most cases—in almost all cases, the record will consist of the claimant's service history and his service medical history; isn't that correct?

A. That is correct.

Q. And even in radiation cases, it is almost always the case that the record will consist of the claimant's service medical records and service history and nothing else; isn't that correct?

A. Almost never is a claimant's folder, that is the appellate record that the Board of Veterans Appeals examines, almost never is it that restricted—is the evidence restricted to those two items you have mentioned.

Almost always there is other medical evidence involved, assuming it is a medical case that we are dealing with.

Almost always their postservice Veterans Administration examination and medical records, almost always their private medical records—reports and records.

* * * * *

[182] Q. Isn't it true that the briefs submitted by attorneys tend to be longer than the briefs submitted by service representatives?

A. I think that is a true statement.

Q. Isn't it true that the briefs submitted by attorneys tend to cite to authority much more frequently than the briefs submitted by service representatives?

A. I would say that is true.

Q. Isn't it true, that the one page handwritten brief is standard practice among service organizations?

A. One or two pages, that is true.

Q. Isn't it true that the substantive appeal submitted by the service representative is typically only one page long?

A. Generally speaking, the substantive appeal is prepared by the claimant himself. In fact, it must be signed by the claimant.

Aren't you talking about the informal hearing memorandum?

[183] Q. Well, let's keep with the substantive appeal for a second.

Isn't it true that in the vast majority of cases, the claimant filing a substantive appeal is represented by a service representative?

A. That is true.

Q. Isn't it true that it is part of the obligation of the service representative to counsel the claimant in filling out the substantive appeal?

A. That is true.

Q. Isn't it true that 38 DFC, Section 19.145a states that the claimant is presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken?

A. That is true. That is not all that regulation, but what you have designated as the pertinent part, that is true.

Q. Isn't it true that either the service representative or the veteran,can sign the substantive appeal?

A. I think that is true that the service representative, in lieu of the veteran, can sign it.

Q. Isn't it true that the substantive appeal is often filled out and signed by the service representative?

A. I am not sure how often that is done.

In my experience most of the time the claimant has signed the 1-9, and whether or not the service officer has supplied the language that goes into it or not, I just don't know.

Q. Is it usually handwritten, the substantive appeal?

A. I would say in the majority of the cases it is.

In the cases that I have seen, I am talking about.

[184] Q. Isn't it true that in addition to the substantive appeal and the statement of an accredited representative, that no other briefs are filed in an appeal?

A. That is correct. The substantive appeal, and the statement of an accredited representative, and then the informal hearing memorandum prepared by the national appeals staffs.

Q. Well, isn't the informal hearing memorandum the same as the statement of an accredited representative?

A. Well, it is my understanding that the local service officers put in a—what is commonly called a statement of an accredited representative, which is a VA form 646, and in addition to that, then the national appeals staff, and again I am talking about the designated—the large service organizations, the VFW, the DAV, the American Legion, the Amvets, Military Order of the Purple Heart—I may have left one out—but also, in each and every case, will prepare what is called an informal hearing memorandum, which supplements the statement of the accredited representative, that having been prepared at the local level.

Q. Isn't it true that the informal hearing memorandum is almost always one or two pages.

A. That is correct.

Q. Isn't it true that the informal hearing memorandum almost never cites to authority?

A. That is correct.

Let me revise that: almost never. Most of the time it does not. From time to time, informal hearing memoranda do cite authority.

[185] Q. Once in a while—once in a great while?

A. We are talking about an infrequent occurrence, that is right.

* * * * *

[188] Q. Isn't the use of experts by service officers very rare?

A. Yes.

* * * * *

[201] Q. Could you enumerate for me the types of disability compensation cases which include complex matters and complex issues?

A. Just about any issue that comes before the Board of Veterans Appeals in the medical field; that is, a medical disability issue could be either very simple or very complex.

It just depends on the varying facts and circumstances of that individual case.

So I can't really give you a list and say, well, every multiple sclerosis case is complex; every radiation exposure case is complex; conversely, every club foot case is very simple.

One cannot make that statement. It depends on the facts and circumstances of each individual case, as to whether it can be called complex or simple.

* * * * *

[209] Q. Isn't it true that about in 11 percent of the cases which appear before the BVA the veteran is represented only by himself?

A. I think that is approximately the correct figure. That sounds about right.

I don't know exactly, but I would say that it is in that neighborhood.

Q. Wouldn't a claimant be more likely to prevail if he retained an attorney, rather than representing himself?

A. I think so. And I think probably the statistics would bear that out, because represented people tend to have a higher allowance rate than nonrepresented people. So I would say yes.

* * * * *

Q. Isn't it true that there is not sufficient free legal representation available for all of the claimants who desire legal representation?

* * * * *

THE WITNESS: Before the Board of Veterans Appeals or [210] generally?

MR. RAM: Q. Generally.

A. All right. I am with you.

Q. Isn't it true that there is no sufficient free legal representation for all claimants who desire legal representation?

A. To the best of my knowledge, that is true.

But I have made no study of that situation. And I think, you know, just as an informed citizen, that my understanding is that that is right.

Q. And isn't it true that about 11 percent of claimants end up representing themselves before the BVA?

A. That is approximately correct.

Q. And isn't it true that claimants who are represented by attorneys are more successful than claimants who represent themselves before the BVA?

A. I think is correct.

* * * * *

[213] Q. In your opinion, is there any justification at all for the statute which limits to $10 the amount a veteran can pay an attorney to represent him before the VA?

A. That is a political question. It is something, you know, that has been enacted that I certainly have had no input in whatever.

As an employee of the Veterans Administration, I am, you know, sworn to work within that system, and there is no way I can change it.

I don't—do you want me to give my opinion on it?

[214] Q. That is what I am asking for.

* * * * *

MR. RAM: Q. The question is:

In your opinion, is there any justification at all for the $10 limitation?

A. Well, it protects the—the rationale obviously for that rule is it conserves the corpus of the award for the claimant and the claimant alone, and excludes the attorney from it.

Q. In your opinion, is there any other justification for the $10 limitation?

A. I can't think of any. There may be some.

This is just right off the top of my head—I have not given any deep thought to any of this—the reason is that

the system is the system, and I work within it as an employee of the federal government.

Q. The justification that you just gave me has no applicability at all to claims that are denied; isn't that correct?

A. That is my understanding; that the $10 would apply only in an allowed claim, and it would come out of the award.

Q. Well, my point is that isn't it true that if the claim is denied, there is no corpus to protect?

A. True. yes.

[215] Q. So in the case of claims that are lost, there is no justification at all for the $10 limitation, is there?

A. You have said it all, when you say a claim is denied and there is no corpus to protect. That is a true statement. And I can't say it any better than that.

Now, if you are looking for or asking a different question, would you please ask it again? I just didn't understand the nuance there.

MR. RAM: Would you read it back, please?

(Question read.)

THE WITNESS: The justification for—the rationale for the $10 fee limitation is to protect the corpus of the award, and make sure the attorney does not share in that award in any way, other than to the extent of $10.

If the claim is denied, like you say, there is no award to protect. I agree with that statement.

* * * * *

[218] Q. Before the break, I was asking you what your opinion was as to the justification, if any, for the $10 fee limitation.

I think you gave two justifications. You said, first, it could protect the corpus of the amount for the claimant in cases in which the claimant does manage to prevail; and secondly, you said it could keep the claimant from having to pay a fee to his attorney in cases in which the claimant does not prevail; is that correct?

A. That is correct.

Q. And I think we agreed that the first reason of protecting the corpus is inapplicable to a case in which the claimant does not prevail; is that correct?

A. That is correct.

Q. Isn't it true that the second rationale, i.e., preventing losing claimants from having to pay attorneys' fees could be just as easily accomplished by a system in which claimants retain attorneys on a contingency fee basis?

A. I suppose. I understand a contingency fee basis is where the claimant would pay absolutely nothing—nothing whatsoever, unless the claim were won, and then I would suppose that is right.

Q. And in your opinion, other than the two justifications that you have enumerated, is there any other rationale for the $10 fee limitation?

[219] A. I have been unable to think of others.

Q. Are there any instances about which you have heard in which a veteran has been taken advantage of by an unscrupulous attorney?

A. I can't state an instance of that.

Q. Have you ever heard of such an instance?

A. No, no.

* * * * *

[227] Q. Isn't it often difficult to determine, with any amount of precision, the degree of exposure that the veteran has suffered in a radiation case?

A. Yes.

Q. Isn't it often the case that no film badges were issued or worn at the various atomic tests?

A. Yes.

Q. And isn't it a difficult problem to try to reconstruct sometimes 25 to 30 years after the fact, the exact dose that a veteran received?

A. Yes.

Q. And isn't it true that to the extent that records maintained 30 years ago were inadequate, you are simply stuck with them?

A. Often that is the case.

Q. And isn't it true, if a claimant claims he was bathing or swimming in radiated water, you simply have no way to determine the degree of exposure?

A. That often is the case. We have only his word for what has happened about what has taken place; what he

can tell us about bathing and maybe what he has eaten, ingested or inhaled, and it is a very difficult matter from what he is able to remember about it, to get any kind of scientific estimation or reconstruction, if you will, as to what the degree of gamma or beta radiation exposure may have been, yes.

[229] Q. But neither the field office nor the BVA made any attempt to secure data on alpha radiation or beta radiation; isn't that correct?

A. It is my understanding, of course, the only place or official source we have of securing any radiation exposure data is from the Defense Nuclear Agency.

I think efforts are underway for them, for the Defense Nuclear Agency to reconstruct beta radiation exposure.

I think information is not available though from the Defense Nuclear Agency as to alpha, and as I said before, the Board of Veterans Appeals is a quasi judicial body. We are not in the dose reconstruction business. We don't have that capability at all.

Q. And the field office would not go to any source outside of the defense nuclear agency to obtain exposure data; isn't that correct?

A. That is correct.

Q. If a claimant said he was bathing or swimming in radiated water, how would you determine his exposure?

A. I have said we have no way to undertake any kind of reconstruction. We have no formula to apply.

Q. So you would not know whether he had been—you just wouldn't know the degree of exposure or not, would you?

A. That is right. We would only have his word for the fact that he had bathed, eaten, inhaled, et cetera.

Q. And it would be up to the claimant to provide some evidence of exposure; isn't that correct?

A. That is correct.

[230] Q. Isn't it true that the claimant's service records are often lost or destroyed?

A. It happens. Of course, there was the infamous fire at the Record Center in approximately 1973, and a substantial number of World War II and I think Korean conflict veterans' records were, at least in part, destroyed. So it does happen.

Whether you could characterize that as being often, I think that is a—too strong a statement.

Q. But a substantial number were destroyed.

A. That is correct.

Q. And does that not even further complicate the process of determining exposure in a radiation case?

A. To the extent that veterans from those periods of times records were destroyed in that fire, that is a true statement.

And I don't know precisely what time frame of those veterans we are talking about who were involved in what we call fire-related—that fire-related service record situation.

Q. But as to those veterans, it does make the case more difficult, doesn't it?

A. Of course. Of course.

* * * * *

[231] Q. Isn't it also true that there are no records of exposure to Agent Orange?

A. That is true. No efforts were made to monitor exposure to Agent Orange.

* * * * *

[249] MR. RAM: Q. Isn't it also true that no effort is made in atomic veteran cases to cross-reference the claims of veterans who have suffered the similar exposure?

A. Cross-reference how, and by whom?

Q. Well, let's start with the BVA.

The BVA gets a claim from an atomic veteran who was on, say, the FULTON, at Operation Crossroads, and it makes no attempt, does it, to review the claims folders to see whether other veterans on the FULTON have filed atomic veteran claims?

A. No, you are right. No effort of that nature is made.

Q. Nor is any such effort made by the VA field office; isn't that correct?

A. To the best of my knowledge, that is correct.

Q. So if somebody is on the USS FULTON at Operation Crossroads and gets leukemia 30 years later and brings a case and prevails, and then the next day his buddy, who

was right next to him on the USS FULTON at Operation Crossroads gets leukemia and brings his own case, the VA will not look at all to the first case in deciding the second one; isn't that correct?

A. I can speak only to the practice of the Board of Veterans Appeals. I am not sure what the field offices' approach to that would be.

But of course, one of the reasons we have kept the radiation exposure cases to two sections—confined them to two sections is so that people who are similarly situated will be presented the same way, and attorneys and board members who [250] work at atomic veterans cases are under an affirmative obligation to be aware of the kind of cases that have been allowed in the past.

So that when a similar case comes to our attention, it can be handled similarly, or there would be a good reason for distinguishing it on its facts.

Q. But the evidence of record in the first atomic veteran's case that I described would not be considered in the second atomic veteran's case; isn't that correct?

A. Yes, that is generally a correct statement.

Q. So if the veteran who brought the first atomic veteran's case had gone out and gotten expert medical testimony, that would not be considered in the second atomic veteran's case; isn't that correct?

A. Well, I am not sure that that is correct, because I understand medical opinions in similar cases have been considered in other cases.

I have never personally seen an instance though where an expert opinion in what veteran's case has been used in another case on the—at the Board's own motion.

Q. Isn't the BVA compelled to follow the regulation that provides conclusions reached in individual cases will not be followed as precedents?

A. That is correct.

Q. Does the VA make any effort at all to determine how many claims are made by the participants in a particular test blast?

A. No.

Q. In an atomic veteran case, does the VA make any attempt to [251] interview fellow servicemen of the veteran?

A. Ordinarily the burden of that falls to the veteran.

In most cases, the VA would not actually send its representatives out to interview fellow servicemen.

That could happen if the Board of Veterans Appeals wanted that done, we could order it done and the field station would have the capability of doing that, but that would not be the usual case.

Q. Are you aware of any instances in which the VA has interviewed a fellow serviceman of an atomic veteran?

A. I can't recall a specific instance of that.

* * * * *

[258] Q. You said that staff attorneys can ask questions of the claimant.

A. At the discretion of the chief member.

* * * * *

[259] Q. But isn't it true that the answers given by the claimant to the staff attorney's questions at the hearing can be used as part of the basis for denial?

A. That is true.

* * * * *

[263] Q. Would you look at the first page of Plaintiffs' Exhibit No. 74 (Standefer Deposition), which is a chart that we have compiled based on the hearing data sheets that are attached to it.

I think it is self-explanatory, which shows that the average amount of a BVA hearing from the period of January 1982 to April 1983 was a little under 40 minutes, 39.49 minutes. Does that sound right to you?

A. Yes.

* * * * *

[267] Q. So there is only a personal hearing before the Board in three out of 40 cases?

A. That would be a rough truism, yes.

* * * * *

[269] Q. Isn't it true that the instances in which anyone other than the claimant testifies at BVA personal hearings are infrequent?

A. Yes.

* * * * *

[270] Q. Isn't it true that statements from expert witnesses are only infrequently submitted?

A. That I think is true.

Expert witnesses appear either personally or in writing, if you will, very infrequently.

Q. And isn't it also true that the occasions on which experts are—or experts testify in person at the BVA personal hearings are even more infrequent?

A. That is right.

Q. In what percentage of personal hearings in radiation cases are expert witnesses called to testify?

A. Very infrequently.

* * * * *

[276] Q. So basic legal entitlement would essentially mean that the claimant has a meritorious claim for compensation; isn't that correct?

A. True.

Q. So the BVA takes the position that a claimant who has a meritorious claim to service connected death and disability compensation, has a basic legal entitlement to that compensation; isn't that correct?

A. Legal entitlement—would you say that again?

(Question read.)

[277] THE WITNESS: If one can meet the elements for the establishment of service connection, if you can demonstrate in that particular instance that a disease or injury has arisen coincident with service, then there is basic legal entitlement to a grant of service connection and a monetary award, if the disability meets the schedule for rating disabilities.

That would be an example of basic legal entitlement.

* * * * *

MR RAM: Q. So if a claimant meets the requirements of the statute for death compensation or disability compensation, he is legally entitled to that.

A. True.

Q. I would like you to enumerate all the different sources that comprise the law by which death and disability compensation claims are governed.

And by that I mean to include the statute, the regulations, the manuals, the circulars, the interim issues of the program guide, the appellate regulation policy procedures—could you enumerate all the different sources for me that comprise the law in the death and disability compensation cases?

A. I will be glad to, to the extent that I can, but I will have to make it perfectly clear that there will be a demarcation between the things which are regulatory, that is absolutely [278] binding on the Board of Veterans Appeals, and the local level adjudicators; and those things which are instructive, persuasive maybe, but not absolutely binding upon them.

Let me start with the regulatory matters first. Of course, the statutory law is binding. This is on both the field and the Board of Veterans Appeals. I am talking about the field adjudicators and the Board of Veterans Appeals.

The regulations of the Veterans Administration are binding on each. The precedent principles of the general counsel are binding on each.

And those with respect to the Board of Veterans Appeals are the only thing that are binding or even persuasive are just those three—the three criteria I have mentioned, embodied or found in those sources of material.

Q. Well, let me stop you there.

Isn't the BVA also bound by the Board of Veterans Appeal Manual?

A. No. That is not regulatory. That is instructive, but not regulatory.

It does not bind any member of the Board.

Q. Who promulgated the BVA appeals manual?

A. The chairman of the Board of Veterans Appeals.

Q. And the BVA is not bound by the BVA manual, a copy of which is marked as Plaintiffs' Exhibit No. 45 (Standefer Deposition)?

A. Most of the matters in there pertain only to administrative things—format matters.

There are a few sections, for example, there is a section [279] on appellate guidelines that gives some broad guidelines as to the adjudication of certain cases.

But again, none of that is absolutely binding on any member of the Board; that is, a member of the Board in an appropriate case, for good reason, can enter a decision that deviates from instructions in that manual as format or even contrary to the appellate guidelines.

Q. The appellate guidelines are a section of the BVA manual?

A. That is right.

Q. Do you recall offhand which section they are?

A. I will have to look.

Q. On page 1-i of Plaintiffs' Exhibit No. 45 (Standefer Deposition) is a table of contents—well, that is just for Section 1, I guess.

A. Chapter 14 sets forth appellate guidelines, and that is at page 14-i, et seq.

Q. Referring to Plaintiffs' Exhibit No. 45 (Standefer Deposition)?

A. Right; referring to Exhibit 45. And just looking at the table of contents then—

Q. I'm sorry. What page are you at?

A. It is Chapter 14. It is going to be right at the very end of your publication—maybe the last full section.

Q. All right. Chapter 14 contains the appellate guidelines?

A. Right.

Q. And the BVA is not bound by the appellate guidelines?

A. Well, what I am saying is that members of the Board, the attorneys staff of the board is under an obligation to know [280] what is contained in these appellate guidelines, but that is all this information is—just guidelines.

Q. So if a Board member does not want to follow these appellate guidelines, he doesn't have to?

A. That's right, in an appropriate case, if there are equities—if there are other extenuating circumstances that would make for a rational base for a different approach,

then he enters that decision and no one can say that decision is clearly and unmistakably erroneous because the appellate guidelines had not been adhered to, is what I am saying.

These are not regulatory.

* * * * *

[282] Q. Are there appellate procedures for the Board sections apart from what you have designated as appellate guidelines?

A. Well, to the extent those are defined in MBVA-1 that is your Exhibit No. 45—

Q. In addition to the BVA manual, there is also a manual for the field office, is there not?

A. Yes.

Q. And what is that called?

A. There are at least two.

One is designated M21-1. That is a Department of Veterans Benefits publication and the other is—

* * * * *

Q. Can we call the VA adjudication manual?

A. That is fine with me.

Q. And that also is not binding on the BVA.

A. It is not.

Q. Is it binding on the field offices?

[283] A. Again, this is not regulatory and having never worked in a field office, I don't know how persuasive it is.

I can't tell you in how many instances—I have no idea—in how many instances there is any deviation from its provisions, because I don't know what all is in it.

But I do know that it is not regulatory. It is not part of the law or the regulations.

Q. You mentioned another manual.

A. That is right. And that is the so-called program guide, which is a manual labeled "PG"—and I am not sure exactly what the numerical designation is—but in common parlance, it is well known by all employees of the adjuciation division of the Veterans Administration as the program guide.

Q. And that is not binding either?

A. And that is not binding either.
Q. And are there circulars?
A. There are circulars.
Q. And those are separate from everything we have talked about so far?
A. Yes.
Q. And those are not binding either?
A. No.
Q. Are there also interim issues or are those interim issues simply part of the manuals that we have discussed?
A. There are interim issues, technical bulletins.
Q. There are interim issues separate from anything we have talked about so far?
A. That is right.
[284] Q. And those are not binding either?
A. No.
Q. And there are technical bulletins?
A. That is correct.
Q. And those are not binding?
A. No.
Q. Have we left anything out?
A. I can't think of a thing.
Q. Are there also VA regulations as opposed to what is contained in 38 CFR?
A. The so-called VA regulations are all embodied in Title 38 of the Code of Federal Regulations.

Now, there is a separate publication of what are called VA regulations, but they are all contained under different numerical designations, word for word in the Code of Federal Regulations. They are just bound in different volumes.
Q. I would like to go back now to the three sources of law that you said are binding, which was the statutory law, the VA regulations and the precedent opinions of the general counsel.

Is that a correct enumeration?
A. Yes.
Q. Are the precedent opinions of the general counsel published?
A. They were, but they--they are not published as such now.

They are not in bound volumes now.

They are available in looseleaf form and housed in the office of the general counsel.
Q. And that is in Washington, D.C.?
[285] A. Correct.
Q. Are they available anywhere else?
A. I think probably they are available—I just am not sure whether they are available in the offices of the district counsel of the veterans administration or not.
Q. Are they made available to claimants?
A. Ordinarily not.
Q. Okay, now, I would like to turn to the various sources of—I guess what you would call just guidance, which consists of the BVA appeals manual, which includes the chapter on appellate guidelines, the BVA adjudication manual, the program guide, the circulars, the interim issues and the technical bulletins.

Is that enumeration correct?
A. That is correct.
Q. Is the BVA manual made available to claimants?
A. Generally no, but any claimant who would request, you know, any information from the MBVA-1, you know, could have that information.

But when a claim comes to the Board of Veterans Appeals and an appeal comes to the Board of Veterans Appeals, quite obviously we do not, as a matter of standard practice, send a copy of the MBVA-1 to them.
Q. Is the VA adjudication manual made available to a claimant?
A. And the same answer would apply, no.
Q. Is the program guide made available to the claimant?
A. The same answer there would apply, too; no.
Q. How many pages, more or less, are in the program guide?
A. It would be approximately the same length as what you are [286] calling the VA adjudication manual.

The MBVA-1, more or less, about that same length.
Q. So it would be about an inch thick, maybe more?

A. Well, the way you have it, generally when I have seen it, it is in looseleaf form, and it is two big looseleaf binders.

Q. All right. And the circulars are not made available to the claimant either.

A. No.

Q. And how lengthy are all the circulars put together?

A. I have no idea.

Q. Quite a number of them?

A. Quite a number of them.

Q. And there are quite a number of interim issues also.

A. That is correct.

Q. And those are not made available to claimants?

A. No.

Q. And there are quite a number of technical bulletins.

A. That is right.

Q. And those are not made available to claimants.

A. That is also correct.

Q. Is it fair to say that there is a vast amount of material, both binding and persuasive, that governs VA adjudication of service connected claims?

A. There is a substantial amount of information, yes.

I don't know if we want to quibble about substantial—vast—but let me say yes.

* * * * *

[290] Q. At the BVA level, is it not common for a resolution of a claim to turn on the application of the law to the facts?

A. Well, of course, every Board of Veterans Appeals decision involves the application of law to the facts.

But most of the time, the matters that are very much at issue that determine the claim are questions of fact rather than questions of the interpretation of the law.

Q. So it is seldom in a case that a service representative will raise an issue as to what the correct rule of law should be?

A. That is correct, for the reasons I have just stated.

Often that is not material to the outcome of the claim at all.

Q. In fact, the service representative hardly ever raises the question of what the applicable rule of law should be at the BVA stage.

A. That is right, hardly ever is that raised by the service representative, because generally that is not a matter that is material to the outcome of the case.

[291] Q. In fact, the service representatives concentrate exclusively on the question of fact, and virtually never raise questions of law on appeal; isn't that correct?

A. Seldom are questions of law raised.

Q. In addition to the three regulatory sources that you have enumerated, and the six persuasive sources that you have enumerated, aren't there also prior decisions of the BVA?

A. That is correct.

Q. And are those binding?

A. No; and as we have discussed earlier, the Board does not follow a system of stardie decisive as such, s-t-a-r-d-i-e—decisions of the Board of Veterans Appeals as such, have no precedent value.

However, the Board does try very hard to maintain, in the interest of fairness, some consistency so that claimants similarly situated are treated the same way with respect to the outcome of their claims and what I have said is something that is entirely different and distinct from previous decisions of the Board having precedent value.

Q. So the sources that are persuasive on the VA adjudication system, in addition to the MBVA manual, the VA adjudication manual, the program guide, the circulars and the interim guide and the technical bulletins would also include prior BVA decisions; isn't that correct?

A. Right.

Q. And the digest of those decisions is kept by the BVA.

A. That is correct.

Q. On microfiche in Washington, D.C.

[292] A. That is correct.

Q. And it is not otherwise published.

A. That is correct.

Q. And not othewise made available to appellants.

A. That is correct.

* * * * *

[295] Q. You find that most attorneys who are appearing before the Board have not had much experience in appearing before the VA before?

A. That is correct.

Q. Are they often just doing it as a favor for a friend or relative?

A. Correct.

* * * * *

[299] MR. RAM: Q. So in fiscal year 1982, there were 1,328 central office hearings, and 12 or 14 service officers handled 95 percent of them; is that accurate?

A. More or less.

* * * * *

[300] Q. I think you said that 12 to 14 service officers handled 95 percent of the personal hearings before the Board; isn't that correct, in D.C.—well, it is on the record, anyway.

What I am getting at now is, do the same 12 to 14 service officers who handle 95 percent of the cases in which there is a personal hearing before the BVA in Washington, D.C., also handle 95 percent of the other cases in which there is no personal hearing?

A. And that would be true, too, yes.

* * * * *

[304] Q. Isn't it true that an attorney is often brought into a service connection case only after the claimant has lost at the field office level where he was represented by a service representative?

A. I think that is a true statement.

Q. How many $10 attorney fee awards are you aware of?

A. I can't cite you chapter or verse.

Q. Can you remember one?

A. Nor can I recall one.

Q. Are you aware of any requests?

A. No, I am not.

Q. Isn't it true that many of the VA regulations in Title 38 of the Code of Federal Regualtions are difficult for non-lawyers to understand?

A. Some of them are.

Q. Isn't it true that many of them are complex?

A. Some of them are.

* * * * *

[307] Q. Say there is a service officer who has had experience in working with VA regulations, and there is also an attorney who has had a similar amount of experience in working with VA regulations but has also gone to law school.

Wouldn't it be generally true that the attorney will be better because of that added training at interpreting the regulations?

A. Probably so. The attorney probably would be better.

This does not imply though that the service officer would be inadequate.

Q. But the attorney would be better.

A. I think that is fair.

Q. How many service organization representatives use the Title 38 of the CFR regularly?

[308] A. I have no way of knowing that.

Q. Isn't it true that service officers' briefs hardly ever contain cites to Title 38 of the Code of Federal Regulations?

A. Hardly ever, I think again is too strong a statement.

In the majority of cases, they do not. Many, many times, a citation to 38 CFR, 3.102 may be added. Certainly the provisions that come up on almost each and every case may be cited.

But this again is not what we are talking about. That would be—pro forma, so to speak.

So what you are saying is essentially true, except your language the two words which you have used which—and I think that is too strong—I would just say often certain of the service officers' hearing memoranda do not contain citations to the Code of Federal Regulations.

Q. Or to any other authority, for that matter.

A. That is right.

Q. Would you look again at the BVA manual, Plaintiffs' Exhibit No. 45 (Standefer Deposition), and at page 6-4, Section 6.09b(5), Opinions of Legal Nature, which states, "It is not necessary to refer opinions of a legal nature from another VA office such as opinions of the general counsel, to the service organizations."

Do you know what the reason for that rule is?

A. Opinions of the—when the Board of Veterans Appeals seeks a legal opinion from the general counsel, the Board of Veterans Appeals considers that as just that, an opinion. It is free to accept or reject it.

[309] This is not—this is no reference to a precedent opinion of general counsel, which is binding on the Board.

Q. But it would be persuasive on the Board, would it not?

A. Yes, it would be persuasive.

Q. Why wouldn't you want the claimant to know what the general counsel's opinion was?

A. Just because it is not binding. It is not considered necessary to submit it to them.

Q. Wouldn't it be helpful to the claimant to see what the opinion of the general counsel is?

A. It might be.

Q. Isn't this rule inconsistent with the notion of the VA as a nonadversarial system?

A. No, it is not. I don't think there is any inconsistency in this and the nonadversary nature of the Veterans Administration at all.

Q. Even though you are withholding information from the claimant that might be helpful to him?

A. Well, the information might or might not be helpful to him.

The opinion of general counsel might be to deny the claim.

Q. Well, even in this case, at least the claimant would know the reason why his claim might be denied, and he might be able to bring up factual evidence, or make a legal argument in opposition; isn't that true?

A. It might be true in an appropriate case.

* * * * *

[323] Q. Is there any formal policing mechanism at all to assure the quality of representation provided by service officers?

A. As such, no.

Now, the Veterans Administration must accredit each service officer who appears on a regular basis to present claims. But most of this accreditation, as I understand it, goes to good character and that kind of thing, rather than as such competence.

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VOLUME I
DEPOSITION OF THOMAS A. VERRILL
MAY 3, 1983
(CAPTION OMITTED)

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[3] * * * * *

EXAMINATION BY MR. ERSPAMER

MR. ERSPAMER: Q. Would you please state your full name for the record.

A. Thomas A. Verrill.

* * * * *

MR. ERSPAMER: Q. Mr. Verrill, what is your official title?

* * * * *

[4] THE WITNESS: Adjudication officer.

MR. ERSPAMER: Q. And can you briefly describe the duties and responsibilities and functions of an adjudication officer with the Veterans Administration.

A. I have supervisory responsibility over a Claims Processing Division. The claims that are involved are all those relating to veterans' benefits, monetary benefit. There's a few minor benefits that don't involve money, but primarily, it's the large benefit program.

I have a large and varied organization under me which includes people from Grade 2 to Grade 14. And the majority of my time is devoted to organizational and supervisory matters, personnel matters, but I do have the final technical authority of interpreting VA regulations, procedural directives subject to appeal by the claimant with the exception of the substantive decisions of the Rating Board.

* * * * *

[5] Q. Approximately how many VA employees are under your supervision?

A. Right now, about 190. We may have lost somebody today or yesterday. It's very close to 190.

* * * * *

[7] Q. Now, I take it from the sketch that you began your employment with the Veterans Administration in 1965?

A. Yes.

Q. And you've worked for the Veterans Administration ever since?

A. Yes.

Q. And you've worked in various offices of the Veterans Administration throughout the country?

A. Yes.

Q. And has your work been primarily in the area of adjudication of Veterans Administration claims throughout that period?

A. Wholely.

* * * * *

[23] Q. In developing a death and disability compensation claim in the atomic veteran area, do you, as a matter of practice, communicate with other regional office levels for--with regard to obtaining information as to other similarly situated veterans?

A. No.

* * * * *

Q. To clarify the situation, let me give you a little example. Maybe it would be more understandable. You have an individual who files a claim with your office who's at, let's say, Operation Crossroads, was on a certain ship. Let's say the PILOTFISH. He claims radiation exposure. Would it be the practice locally to communicate with other regional offices to determine exposure information or other information with regard to similar type of claim advanced to the other regional offices and the information that they have secured in support of that particular claim?

A. No.

Q. And would you, as a matter of practice, review the claims folders within the Northern California regional office to see, in the same situation, whether similar claims from this, let's say, Operation Crossroads, the PILOTFISH, were of file?

A. No.

* * * * *

[30] MR. ERSPAMER: Q. Are you aware of any claims from the San Francisco regional office that are atomic radi-

ation claims that have been granted by the Board of Veterans Appeals?

A. No.

Q. And you're aware, are you not, that, in general, a very, very small percentage of the atomic veteran claims nation-wide have been granted by the Board of Veterans Appeals?

A. That's right.

* * * * *

A. I don't have a figure.

Q. And are you aware of any claims that were granted locally by the—this regional office for service-connected death or disability involving atomic radiation exposure?

A. I'm not aware of any.

Q. And you're aware, are you not, of a substantial number of claims locally have been denied, that such claims have been denied locally?

A. Yes.

* * * * *

[36] Q. And what about—Are you aware of any instances in which the regional office has used an independent doctor or obtained an independent medical opinion with regard to an atomic radiation case?

A. That would be done at the central office level. No, we have not, locally. We would not, locally.

Q. And are you aware of any case that the central office, with respect to one of the claims pending in the San Francisco office, has done so?

A. No.

* * * * *

[53] Q. Okay. Now, putting aside the gamma exposure, do you make any effort to assess exposure from other sources, for instance, inhalation, ingestion, and radiation from sources other than gamma radiation such as alpha emitters and other [54] types of radiation?

A. No. It's not available, to my knowledge, generally.

Q. Well, the only information as to those sources that you might be able to—well, is readily accessible is from the claimant, for instance, or ingestion or, for instance, bathing or swimming in radiated waters, and so on?

A. He wouldn't have any way of determining what exposure he had had, if any.

Q. Right. He'd have no way of determining the exact amount of exposure, but he—

A. Or even if there was exposure.

Q. Well, if I understand you correctly, are you saying that if a soldier was assigned to pick up test instruments from a ship operating at Operation Crossroads at the Bikini Toll, for example, in 1946, and was instructed to go aboard a ship that was radiated right after the blast, that he couldn't testify that he was exposed to radiation?

A. He could testify, but not as to the amount of exposure.

Q. Right. Many of the people didn't have film badges; is that correct?

A. That's right. That's right.

Q. And it's a difficult problem, isn't it, to try to reconstruct it, though, sometimes 25, 30 years after the fact, to reconstruct the exact dose of the radiation that the veteran received; isn't that correct?

A. They're not reconstructing 35 years after the fact. What they do, as I understand it, they take what evidence was gathered at the time and analyze it maybe 30 years later. [55] But, for example, they will have a series of readings from individual film badges and they'll have the composit reading and say that this is the probable exposure. That's the extent of the exactness of it.

Q. And to the extent that the records that were maintained 30 years ago were inadequate, you're stuck with it?

A. That is the truth, yes.

* * * * *

Q. And has the central office made available to you the [56] copies of the papers of Colonel Warren, who was the chief medical officer present at Operation Crossroads, for example?

A. Not to my knowledge.

Q. Are you aware of what I'm referring to?

A. Not really.

Q. Are you familiar with who Stafford Warren is? He was chie of the radiological safety section at Operation Crossroads.

A. No.

Q. So I take it you're not aware that his personal papers regarding Operation Crossroads show that the tolerance limits of Bikini were actually 5,000 times higher than the allowable limit of sent by the Nuclear Regulatory Commission at the time?

A. I don't recall reading it.

* * * * *

Q. Have you—Are you aware of any instance in the local level in which you—the regional office has specifically requested information as to other participants in a particular test shot and the incidence of reported claims, incidence of claims with regard to that specific shot?

A. No.

Q. You're required, are you not, by the regulations promulgated by the Veterans Administration to treat each

* * * * *

[57] Q. Now, I'd like to get into a little bit of a new area, and just generally, as to how the case load is handled on the regional office level. Can you explain generally how employees are given credit for time spent on adjudicating and handling and investigating claims?

A. We have a work measurement system which assigns, based on studies that are performed periodically, the average amount of time that should be devoted to a particular type of claim. Then if you have that type of claim and you take less time, you gain a little, if you take more time, you lose what you gained in the case before, but it's supposed to be an average, and that's a nationally established work measurement schedule.

Q. Now, you say on particular types of claims. Are you talking about initial claims as opposed to renewed claims? Or what types of categories have been set up?

A. We have quite a few categories. They are established by work product. Generally, it runs initial claim, service-connected, initial claim, non-service-connected, review claim.

* * * * *

[58] THE WITNESS: That's a general category without respect to the service-connected issue.

Claims for dependants. Then we have initial service-connected death claims and initial non-service-connected death claims. We have claims based on changes in income for income dependent programs. We have a work measurement schedule for burial claims in general. We have a work product for appeals.

MR. ERSPMAER: Q. When you say "work product," what are you referring to?

A. Work measurement ratio or grant, credit, a work credit for appeals, all these other breakdowns.

Q. Can you tell me what the—what the work credit is for the initial claims for service-connected disability?

A. What the work credit is?

Q. Yes.

A. For the amount of time that's —Well, they get very precise, down to the hundredth.

Q. Well, just roughly, let's say to the nearest hour.

A. Two hours—I would say two hours for an initial claim. It's within that—within a few points of two hours.

Q. Decimal points?

A. Yes. Tenths, I would say.

Q. What about for service-connected death claims?

A. About the same amount of time. The work quarters [59] generally run from one hour to three hours.

Q. And what about appeals?

A. That's a two-hour—within—closer to two than one or three.

Q. And what about non-service-connected disability claims?

A. One and a half, perhaps.

Q. And would it be a similar amount for non-service-connected death claims?

A. More than one work product may apply in the course of processing a particular claim.

* * * * *

[61] MR. ERSPAMER: Q. Now, are you aware of the power that resides in the Veterans Administration to issue

subpoenas to obtain documents in support of a claim that's provided in Section 3311 of Title 38 of the U.S. Code?

A. Yes.

Q. And how many instances are you aware of in which that subpoena power was used to obtain information with respect to a claim?

A. Two.

Q. And that is over how many years?

A. Eight.

Q. Do you recall those specific instances, what the subpoena—who the subpoena was directed to and for what [62] purpose it was issued?

A. Yes.

Q. Can you describe those for me.

A. We had a claimant in Philadelphia who we felt was deliberately misleading us and he would not produce medical records or he would not authorize his private physician to release medical records. We issued a subpoena for those private medical records.

Q. And approximately how long ago was that?

A. Six, five, six years ago.

Q. What position did you hold at that time?

A. Adjudication officer. Same position.

Q. As you hold now but in a different region?

A. Yes.

Q. And what is the second instance in which you're aware that the subpoena was—

A. Well, actually, it hasn't been issued. It's in process. And it's to obtain proceedings on a criminal investigation where the widow is a suspect in the death of the veteran and she is now claiming life insurance benefit. And the sheriff will not let us have the records which we feel may shed light on the extent of the widow's complicity, if any.

So we are in the process of issuing a subpoena to get those records from the Sheriff's Department.

* * * * *

[63] Q. Are you aware of any instances in which the local office has experienced difficulty in obtaining service records? Have they been lost or destroyed or some other reason—

A. Yes.

Q. Can you describe, in general, the problems that have occurred.

A. The major problem was the fire at the NPRC. No. Was it NPRC or RPC? In other words, the records depository. It was the RPC. A fire at the records processing center in St. Louis in 1973 in which many records were consumed. That is the major problem we have had with obtaining service records.

Q. And what records were stored there, in general? What [64] what branches of the service?

A. Individual medical records. From what branch of service? Army. Primarily the army.

Q. And others you're aware of?

A. Well, the Air Force—To the extent that the Air Force was part of the army at the time of those records, the period those records covered, the Navy was not involved in that problem.

* * * * *

Q. And for what period were the records destroyed? I assume it's pre-1970—was it 1973 you mentioned? Going back how far?

A. 1912 to 1959. That doesn't mean that anybody with service in those areas has no records. The majority of persons I like to think who had claims had filed them with the VA and we had possession of the records. Anytime you file a claim with the VA, the first thing we do is get service medical records.

So we had millions and millions of records for people with service in that period. It's only those who had never filed a claim who had the misfortune of seeing their records destroyed. There are other sources to corroborate whatever claim they may be making. I said that they were individual medical records.

We do have medical records pertaining to organizations and we do have personnel records. So it's not a total loss, [65] although it was a very significant loss.

Q. It is unfortunate for the people whose claims depend upon those medical records, establishes a difficulty in proving up a claim?

A. For the lapse of time and absence of records, yes.

* * * * *

[69] Q. And what is your understanding of the purpose of service-connected death and disability compensation?

A. The purpose?

Q. Mm-hum.

[70] A. Well, the term "compensation" implies payment for an injury or—an injury or death following from official duties in service. And the government has an obligation to compensate for that injury. It's a payment in lieu of what would have been continued in services. That's pretty much what it means.

Q. And in instances where entitlement to death and disability compensation is shown, in other words, say, a disability is shown, it often interferes, does it not, with the soldier's ability to obtain meaningful employment in private life as well as in the military?

A. The amount compensated in a disability claim is supposed to be an amount equal to the—what would be anticipated as lost wages from that type of injury in the civilian labor fields. The degree of disaiblity is based on what we call the average impairment of earning capacity.

Q. And how does the service-connected disability, death and disability program, differ from the non-service-connected death and disability program?

A. The non-service-connected is a gratuity that is income dependent. It's, obviously, not related to service, and yet there may be service qualifications, such as war-time service as opposed to other service. And it's intended to supplement whatever income the person may have so long as he has income below a statutory maximum. So it's an income supplement program.

There must be a finding in a disability case of permanent and total disability. There is no disability test [71] in death cases for the widow.

* * * * *

[74] Q. And what percentage of cases decided at the regional level is a hearing requested, approximately, in your experience?

A. I cannot give you an answer on that.

Q. It's a very small percentage, is it not?

A. I just don't have the facts on that. I could tell you how many hearings were conducted over a period of time, but I can't tell you how many decisions are followed by hearings.

Q. Okay. In our tour yesterday, you don't recall telling me that approximately one percent of the regional office determinations resulted in hearings.

A. I don't think I would have said one percent. I might have said something—five percent or less. I don't recall saying one percent. That would seem to me to be too—too small a number.

* * * * *

[75] Q. And in your experience locally, in approximately how many cases does the claimant just not show up for the hearing without telling you in advance?

A. Fairly commonly. Again, I don't have hard data, but it's fairly common.

* * * * *

Now, can you tell me whether you disagree or agree with the following statement: "The hearing process is an important safeguard to the individual and to appellate consideration."

And for the record, I am reading from the MBVA-1, Change 16, Chapter 5, Section 5.02 manual. Do you agree that the hearing process is an important safeguard to the individual and to appellate consideration?

A. Yes.

Q. And that would apply to the hearing—Would your opinion extend as well to hearings held at the local level?

A. Oh, yes.

Q. And what is the value of a hearing, as you understand, at the local level, from the claimant's point of view?

A. It allows the claimant to confront those decision-makers and show himself as an individual. I think—I think

it injects a human note into the whole affair that otherwise would be reduced to an exchange of paper.

And there are situations where just seeing the claimant, particularly in neuropsychiatric cases, just seeing the patient does more for the evaluation process than reading psychiatric reports.

That's one aspect of a hearing, but it also gives the appellant the satisfaction of knowing that the people he is dealing with are humans, that—well, whatever he derives from that, whatever impressions he gets. I can't speak to that. But it's a beneficial process in that it brings matters together so that they can see one another as [79] individuals.

And, of course, with some guidance sometimes from the persons conducting the hearing as to points that may not be clear in the record, we can elicit from the appellant some new facts perhaps sometimes, or he may recall something in the course of discussing the case, he may recall something that hasn't been in the record before.

* * * * *

[80] Q. Now, if I could direct your attention to the exhibit that I had you put your thumb on—

A. Yes.

Q. —and more particularly, to the—if you could for a moment—I'll get my copy here, so I don't have to bend over.—to Exhibit H. And particularly to Exhibit H to the [81] Complaint. And particularly to the statement, "Thirdly, certified statements carry as much weight as in-person testimony." Do you see that sentence, sir?

A. Yes.

Q. Do you agree or disagree with that?

A. I don't agree that it should have been communicated. I don't agree that this letter was appropriate. That's partly why.

Q. Did you sign this letter or draft this letter?

A. No, I didn't. I did not draft it or sign it. I would not have signed it.

Q. And for what reason would you not have signed it, or reasons?

A. It talks of a backlog of scheduled hearings, which is not necessarily true. It says it would most likely be several

months before a personal hearing could be held. That's not true. It discusses time allowed for typing, which is not a consideration. It would delay submission to the appeal, to the Board of Veterans Appeals.

That's not true. This is an inappropriate letter. It is totally dictated by some person. It is not in any way related to or reflect the division policy.

Q. And when you reviewed the Complaint, did you review this particular exhibit to the Complaint? Do you recall?

A. I believe I did. I went through the exhibits, particular exhibits, I did, and the ones relating to the hearing letters I did review. And it was—I had the same feeling when I read this letter. It was inappropriate.

[82] Q. Did you try to ascertain or determine who wrote it?

A. It wasn't material at that time. It had transpired. It had been released.

Q. From the number that appears below, in reply, refer to 343 215, would that indicate the unit that issued it?

A. Yes.

Q. And what unit is that?

A. 215 is a section. It's not a unit. So somebody at a section level wrote the letter, either the section chief or a member of the rating board.

* * * * *

[90] Q. As a matter of fact, the representation of claimants by attorneys is very rare in actual practice in this region, isn't it?

A. It's not common at all.

Q. And would it surprise you if I represented to you that only approximately two percent of cases at the BVA level are the claimants represented by attorneys? Would that statistic [91] surprise you?

A. No.

Q. Would you think a comparable percentage would apply to cases in the local level here?

A. Approximately.

Q. Something roughly comparable?

A. Approximately.

* * * * *

[92] Q. Who at the regional level would be most knowledgeable about the number and incidence of cases in which a claimant is represented by an attorney as opposed to self-representation or representation by a service officer?

A. I would.

Q. And are you aware of any attorneys, private attorneys locally, who specialize in veterans counseling or work?

A. No.

* * * * *

[94] Q. And do you perceive a more compelling need for representation by attorneys in more complex categories of cases such as radiation cases or Agent Orange cases?

* * * * *

THE WITNESS: Whether an attorney is representing the claimant or not, there's certain actions that we will take. I'm sure an attorney who's got a strong interest in a case will pursue it and inquire as to what our procedures are and see that we followed them.

In that sense, he might do that, where the person representing himself would not, would not know what our procedures are. He could find out, but we don't volunteer that. It's a question of assuring that we do what we're supposed to do, which we normally do, so—

Q. It's a lot more than that, isn't it? The attorneys can certainly—You use, for example, the Freedom of Information Act to gather documents from agencies other than the agency that you refer to for, let's say, evidence of exposure to radiation?

A. If he's aware of other sources that would contribute evidence to the case, yes.

[95] Q. And the attorney would have a greater facility or ability to obtain experts to testify as to—on issues such as exposure, causation, and so on, medical experts, other experts?

A. I would imagine he could, yes, if there's a case to begin with.

* * * * *

[96] [A.] And there's a lot of room for judgment in cases involving the rating boards. For example, in psychiatric cases, how do you determine whether somebody's 30 percent disabled or 70 percent disabled. There's a wide scope for judgment there. In some discharge cases, you're dealing with a question of whether or not they were compelling circumstances for a person going AWOL, and that requires evaluation of his motives, and so forth. And it gets quite involved.

Q. What about post-traumatic stress syndrome cases? Is that a category you would say involves a lot of area for judgment as well?

A. Yes.

* * * * *

[97] Q. They're more difficult to win is what you're saying? Radiation cases are very difficult to win?

A. With those facts, yes.

Q. Well, they—The vast majority of the radiation cases have been denied. Is that your understanding of the case?

A. Yes.

* * * * *

[113] Q. Can you identify it for the record?

A. It's a Department of Veterans Benefits Circular 21-80-1 signed by the chief benefits director as revised January 4, 1982.

A. And can you just explain what a circular is?

A. It's a directive limited to a particular issue that goes beyond the regulatory language. It expands on the regulations, ordinarily. Quite often, they cover new legislation that there's been no time to incorporate into the statutes.

Q. And can you explain how a circular differs from an interim issue?

A. An interim issue is a change to an existing manual that is published pending revision of the manual. And a circular stands on its—It's a complete statement and there will be no incorporation in a manual, ordinarily.

[114] Q. And are circulars published in the Federal register?

A. I'm not certain of that, to be honest with you.

Q. Are they available to a claimant's representative upon request?

A. They get them automatically, the service organizations that are associated with it.

Q. What about private attorneys?

A. Oh, no, other than through the Code of Federal Regulations which wouldn't incorporate the circular.

Q. Is there any other material in the nature of substantive standards or procedural standards that is not available in the Code of Federal Regulations?

A. I don't know of any.

MR. STOLL: I think we've—

MR. ERSPAMER: Q. What about program guides? What is a program guide?

A. Well, the agency position is that that's not a substantive publication with the weight of regulation.

Q. What is not, the program guide?

A. The program guide.

Q. What is a program guide, though?

A. It's a discussion of problem areas. It elaborates on particulars of a problem area.

Q. For example?

A. Well, we commonly get them on income—discussing income situations where you have a regulation that says that charitable income is not countable. Then you'll have a program guide that says this particular source of income is a [115] charity.

Q. Can you think of an example in the context of death and disability compensation of a program guide?

A. We have one on individual unemployability that expands on the provision of the rating schedule.

* * * * *

[116] Q. Are you aware of any claims granted for the—for medical conditions resulting from alleged exposure to Agent Orange?

[117] A. I'm not aware of any, myself. There have been some, I understand, for chloracne, c-h-l-o-r-a-c-n-e.

* * * * *

[119] Q. So if I understand you correctly, there's a—the problem in many of the cases has been a failure to

show a correspondence or a causation between the problem the veteran is experiencing and the exposure to Agent Orange?

A. Right

* * * * *

[126] Q. What type of workup do you use locally with regard to post-traumatic stress syndrome case? For example, would you go out and interview—try to identify who some of his fellow servicemen were in the area at the time or document an—

A. No.

* * * * *

[128] Q. And approximately how frequent is this type of claim, in your experience in the local level? More than the radiation claims?

A. Yes.

Q. More than the Agent Orange claims?

A. About equal. Quite often, we get dual claims, Agent Orange and PTS together. The person claims both, we find that he has PTS.

Q. And I think you said a few moments ago that quite a few of them have been granted?

A. Yes.

Q. Do you have any idea as to the approximate percentage that have been granted at the local level?

A. yes.

Q. What percentage?

A. Well, it has varied over if past several years. It has increased over the past several years. Initially, it was running about 20 percent. Then it went to 30. Now it's in the 40 percent range.

* * * * *

VOLUME II

DEPOSITION OF THOMAS H. VERRILL
MAY 6, 1983
(CAPTION OMITTED)

[144] * * * * *

Q. Now, in a case where hearings are requested locally, it's rare, is it not, for a hearing to be requested before an initial decision?

A. I would say it's rare. It's not common at all.

Q. It's more common, is it not, where hearings are requested in the local level for them to be requested after the initial decision has been rendered?

A. Yes.

Q. And the initial decision, if, again, I might refer you to the Complaint, is usually expressed in very, very pithy, if I might say, terms, such as Exhibit K to the Complaint which states, "Your claim for death benefits is disallowed. The evidence does not establish that the veteran's death was due to a service-connected disability." That would be a typical notice of decision, would it not?

A. What you're showing me is a computer notice that are the most common notices for initial resolutions; however, we have a whole category of claims in which the employees are instructed not to use the Target correspondence. It is generally insufficient. My opinion is that the computer—We call it Target. The computer correspondence is inadequate for many situations.

[153] * * * * *

Q. Now, in connection with the adjudication of the decisions at the regional office level, do you occasionally find that the claimant does not understand the procedural process locally?

A. Yes.

Q. And, in fact, occasionally, you'll find that you receive requests from a claimant for a hearing over the phone, as an example?

A. It's possible they could request a hearing over the phone, yes.

[155] * * * * *

Q. Well, it's generally—It's generally the case that where there's been a failure to file timely, the BVA will deny the appeal on that basis?

A. I can't say that that's true. That would be the more common situation, yes, but I just want to make the point that they do have the option of ruling on the merits. And I've seen them do it on occasion.

[163] * * * * *

MR. ERSPAMER: Q. Did you have a total there then that you've added up that would approximate the number of appealable decisions?

A. Well, the total is close to 250,000.

Q. Some grants might be an appealable decision. For instance, if somebody got a grant of a 40 percent disability rating and thought he was totally disabled, that might be an appeal decision which he had incentive to appeal, correct?

A. All grants are appealable and all disallowances are appealable. We don't normally get a disagreement with a grant. Not as commonly as with a disallowance, of course. But any grant is appealable even if it's what was originally claimed in toto.

Q. So roughly one out of every 125 appealable decisions on [164] the regional offfice level actually result in NODs. Would that be a rough approximation?

A. If that's the ratio you found, I will accept that, yes.

Q. 1954 over 250,000? It would actually be something a little less than that. But approximately one in 125.

A. Now, let me doublecheck something here. That's right.

[171] * * * * *

Q. What does it mean to, let's say, in the case of an initial compensation claim, to the number 2.284, what does that mean as expressed in the local process?

A. The whole division gets two hours and eight-four hundredths hours credit for each initial compensation claim process.

Q. And credit in terms of what?

A. In terms of productivity, it's a productivity measurement. That amount of time is measured against the [172] number of people we have to do the processing in a given amount of time.

So if we have a ratio of production hours to actual employee hours, that is, within a range of the national average, then we are considered to be appropriately productive.

Q. And do you get heat, so to speak, from the central office if you productively arrange dips outside of those parameters?

A. Within a ten percent range, let's say. For example, if the national productivity were 85 and we had 75, we'd be at the lower end of the acceptable range. We would probably get some inquiries, yes.

Q. And what would the 85 signify?

A. 85 percent productivity, the ratio of the work product credits earned to the available people. That will allow 15 percent margin for overhead—

Q. I see.

A. —annual leave and things like that.

Q. In the case of an individual employee, are statistics mantained with regard to their productivity?

A. Yes.

Q. And are those maintained locally or at the national office?

A. Locally.

Q. And can you explain the respect in which the advance of an employee within the heirarchy depends upon his personal productivity ratio?

[173] A. When it comes to employee performance, we consider three major factors. None of them dominates. You can have high productivity and not get promoted if your quality is lousy. We also consider the timeliness of the actions you take. So we have three major categories; production, quality and timeliness. You have to do well in all three to be competitive.

Q. And how do you gauge the timeliness of actions? What mechanisms are in force to do so?

A. Well, we use a system whereby we categorize the work on hand in terms of being a certain age. And we break

the work down as work that's 14 or less days old as opposed to work 15 or more days old.

And then we get a division total ratio of category one as opposed to category two. That ratio becomes a norm for employees. So if you have an employee who has a ratio out of—way beyond the average, that person would have a timeliness problem. We have a specific standard. I think we revised it recently, but I think it's one and a half times.

[196] * * * * *

Q. Now, the case of the rationale you expressed about depletion of the legal benefits, that is not—does not and could not apply at the present time to Agent Orange claims which you testified on Friday have all been denied, correct?

A. Well, we had specifics on the ratio of denials. None [197] has been granted on the basis of Agent Orange exposure, per se. That's true. So you're not depleting anything where there is no grant. That's for sure.

Q. And the Agent Orange claims, I believe you testified, present particularly troublesome questions on—in the area of causation and other questions?

A. From the medical standpoint, yes. The causation is something that has not been resolved by the medical profession with the exception of very few limited disabilities.

Q. And in the case of atomic veterans, the vast majority of those claims have been denied, too, and so the same rationale would apply—excuse me—the same conclusion with regard to the depletion rationale would apply to those cases, would it not? In other words, there isn't any depletion where the claims have been denied?

A. That's right.

[198] * * * * *

Q. With regard to the volunteer organizations' role, your understanding of the rationale of the free available service rendered by service organizations depends on an assumption, does it not, that they perform an adequate role that is comparable to that which would be played by attorneys in the process?

A. I don't know if anybody is stating that.

Q. My question is—

A. As far as the question goes to adequate representation, our consensus is that they do provide adequate representation.

Q. Have you ever come across any situation in which you concluded that a service representative had not provided adequate representation?

A. It has happened, yes.

Q. And if the fee limitation was eliminated, it wouldn't preclude a continuing role for service organizations? You're not saying that it would, are you?

A. No.

Q. And if the fee limitation was eliminated, it would allow the claimant to decide whether he wanted an attorney or a service organizations to represent him?

[199] A. Well, that's true, but the danger is that a person might feel they need an attorney to, in effect, complete a form where they meet all the legal requirements with no exceptions, and would have got a benefit with or without an attorney. And they will suffer a loss of a benefit that would otherwise have been totally theirs.

Q. That conclusion or that scenario assumes that they—that basically, they would not be well versed or understand their entitlement, does it not? In other words, it assumes that they could not make—they're not capable of making the decision about whether or not their claim is complex enough as to require the services of an attorney?

A. Well, it assumes that they did not or will not have gone through that process.

Q. Now, you say you have been confronted with a number—some situations in which a service organization representation has been inadequate. Can you give me the most recent example you can think of, describe to me.

A. The details aren't all that clear, unfortunately, but something in the range of a year ago I came across a case where I felt the decision had been wrong, let's say, for short, and should have been appealed. And the service representative did not appeal it. I personally prepared a notice of disagreement, took it to the service representative, and asked him to sign it, which, of course, he did.

[200] * * * * *

Q. Well, you're not suggesting, are you, that all VA claims are as simple as filling out a six-item form, are you?

A. Not at all.

Q. A lot of the claims that are currently being adjudicated by the VA require considerable workup and work, do they not?

A. Yes.

[207] * * * * *

Q. And can you just identify for the record the—these two bound volumes that have been produced?

A. Together, they constitute what is called DVB, Department of Veterans Benefit manual, 21-1. It's a basic procedural manual for the adjudication division.

Q. And can you explain the circulation of the basic manual?

A. Yes. Employees from the GS-4 claims clerk level up to my level receive a copy. Claims examiners will each have a copy, for example. Rating specialists will have a copy. Sometimes they share one copy for the whole board because they don't need—most of the rating specialists have their own personal copy, though.

Some of the claims clerks share a copy. But the claims examiners each have their own copy as do all the supervisors.

Q. And is it circulated outside the agency at all?

A. Service organization representatives would have copies or could have them if they don't. I think most of them do.

Q. And they can obtain copies upon request, service organizations?

A. Yeah.

Q. What about claimants who represent themselves? Would [208] you furnish a copy to them upon request?

A. If they ask for it, yes. I don't recall any requests for it.

Q. And what about attorneys for claimants? Do you recall any request for it by an attorney?

A. No. Generally, they ask for more substantive material such as material from Title 38 or the VA regulations.

That's a procedural manual that gets very, very detailed regarding a lot of mechanics.

Q. And at the front of these volumes, I see a lot of changes with various dates on them. Do the sections that follow incorporate all those changes that are referred to in the changes in the beginning?

A. Yes.

[209] * * * * *

A. That is the Department of Veterans Benefits program guide manual, 20—Wait a minute. No. Program guide 21-1.

Q. How does the program guide differ from the M21-1 MBV that was marked as Exhibit 17?

[210] A. M21-1 is a procedural manual. PG 21-1 expands on specific problem areas that have arisen here or there throughout the country, and central office is trying to explain just what policy we should follow.

Q. So you would expect that the program guide would not necessarily cover every base in the system but just certain select topics; is that right?

A. That's right.

Q. And can you explain the circulation of the program guide.

A. Perhaps a bit more restricted than the others in that claims clerks might not get them but claims examiners would get them. Rating specialists and supervisors would get them. We also furnish copies to service organization representatives.

Q. And are they periodically updated? Are you given updates of it?

A. Yes.

Q. And would circulation be similar as you described for the procedural manual with regard to attorneys and claimants?

A. Yes, if they are aware of the program guide or if it's cited in anything we send to them, then they have means of identifying it and they ask for it, we certainly would give it to them.

Q. In your experience, are attorneys generally aware of the existence of the program guide?

A. I would say generally not, unless we happen to cite it as a basis for our action.

Q. What about claimants, unrepresented claimants?

[211] A. On the same conditions.

Q. What about their awareness of the procedural guide, which was Exhibit 17? Are attorneys generally aware of the existence of the procedural guide, M21-1?

A. Not specifically, no.

Q. And what about claimants? Would your answer be the same?

A. Yes.

[220] * * * * *

Q. And is there anything else that you apply by way of either procedural or substantive standards?

A. Circulars? Did you mention circulars?

Q. Okay. I don't think I did specifically mention circulars, yeah. Circulars would be something else that would emanate from Washington, D.C.?

A. Yes. That's essentially it.

Q. And judged collectively, that's a considerable volume of material, is it not?

A. Yes.

Q. Are there—Is there an index, collective index, to this material?

A. I have a cross index myself.

Q. That you personally developed?

A. Yes.

Q. And are copies of that available to everybody in the regional office?

A. No.

Q. Is the cross index you developed included in the material which you brought with you this morning?

A. It's a card file.

Q. So it's not, I take it?

A. No.

Q. And is that something that you've developed over a course of, what, 15 years at the VA?

[221] A. Yes.

Q. How many—Approximately how many cards are in the card file?

A. The file is about six to eight inches deep, so how ever many cards you could get in that, 100 or 200.

Q. And for what purpose did you develop the card file?

A. To save myself a lot of time. We intend—I might as well add a postscript at this point. We intend to develop for local use, at least, a cross index for all employees as soon as we get a small computer. We are now in the process of trying to get permission to buy a small computer. One of the first uses will be an index available to all employees.

[223] * * * * *

Q. Now, isn't it true that the typical substantive appeal prepared by a service organization is one page or less?

A. Yes.

Q. And—

A. Can be less than one page.

Q. And generally, you don't receive a brief, so to speak, a legal brief of citations to authority and description of the facts and interwoven—interweaving the facts in the law in the case of a substantive appeal?

A. They do not routinely prepare briefs.

[225] * * * * *

A. It's within the range of the typical submission, yes.

Q. In the case of where a hearing is requested by a claimant at the regional office level, it's often typical, is it not, for the claimant to meet the service officer half an hour or so before the hearing for the first time to discuss the—what would be presented at the hearing?

A. I would say that's the more common situation, yes.

* * * * *

Q. Now, in the case of local hearings and excluding the BVA hearings that are held at the local offices, it's typical—in the typical hearing, the only witness who appears is a claimant, usually; isn't that correct?

A. Well, quite often they will have one other person with [226] them because they needed help getting here. We deal with a lot of elderly, naturally disabled people, too, and quite often, they'll have a friend or relative accompany them but they don't really participate in the hearing.

Q. So if I understand you correctly, a number of the claimants who appear for the hearings are elderly or disabled?

A. Yes.

Q. And so my statement is correct, that as far as testifying or taking an active role in the hearing, the person—in the case of a hearing, it's typical just for the claimant to testify?

A. It depends on the type of hearing. Other than hearings relating to nervous conditions, that's true, but when you are dealing with nervous conditions, it's more common there to have a family member along testifying as to the behavior. Almost a majority of our hearings relate to nervous conditions. It's really a very common topic for a hearing.

Q. And that would include post-traumatic stress syndrome?

A. Yes. Of course, it's the subject that has more room for judgment, too.

Q. And with regard to documentary evidence, it's rare, is it not, to get documents introduced at a hearing at a local level? And I'm putting aside everything that's filed before the hearing is held, I assume which includes the service records and the medical records and everything. But to actually have a witness offer documents at a hearing at a local level is rare?

A. I don't know that it's rare. More commonly, they come [227] in with themselves alone with their case, that's true. But I wouldn't say it's rare. Quite often, they come in with a recent medical report either from a private hospital or private doctor. That's the most common type of document they bring with them.

Q. Can you recall other types of documents, putting aside, you know, the medical reports?

A. Documents relating to dependants. That would be one. I don't know if I've exhausted the types. I'm trying to think of what else they might bring. Personal statements or statements from friends and relatives are sometimes introduced.

Q. Are they infrequent?

A. Yeah, I would say so. They normally come prepared to make verbal testimony only.

[228] * * * * *

[A.] One of the problems of hearings is the agitated state of the appellants. That's a matter of concern for me when it comes to the safety of the hearing panel. We have had threats. We have had people come in with what could be described as a weapon. And it's a serious concern.

[228] * * * * *

They tend to repeat what we already have on record, and there's a lot of rambling conversation which we try to control but we don't go too far in controlling that.

[229] * * * * *

Q. Well, would you often find—you said that the statements were often rambling. Do you find they often include a lot of irrelevant matter?

A. Oh, yes.

Q. And do you find that often they're very emotional?

A. Yes.

Q. Is that more prevalent in the case where a claimant is unrepresented than when a service officer or an attorney represents them?

A. I don't think, when it comes to rambling nature and the emotions, whether it matters. I—I really don't think that that makes a lot of difference to the claimant. They can be very agitated whether or not there's a representative sitting with them.

Q. And do you find that a high percentage of people are agitated and emotional?

A. Well, as I pointed out earlier, we tend to get a lot of hearings on psychiatric cases, and that's part of that type of case.

Q. Now, in the case of a hearing, there's a panel, as I understand it. The Rating Board, the three people on the Rating Board, would conduct the hearing; is that correct?

A. Well, you would have three persons; two rating specialists and the medical specialist, the doctor.

Q. And is it your standard practice to have the claims examiner there who made the initial workup on the case?

[230] A. No.

Q. And is it your practice to have that person available for cross-examination at the hearing?

A. No.

Q. Is it possible for the claimant to request that that person be present for the—for cross-examination and that request to be honored?

A. We've never had such a request. I don't know how it would aid anybody, as a matter of fact.

[232] * * * * *

Q. How frequently do claimants introduce scientific articles that are studies in support of a claim?

A. Well, let me answer that in a roundabout way.

MR. STOLL: Are you taling about at the hearing or at any point?

MR. ERSPAMER: At the hearing. At a hearing.

THE WITNESS: It is uncommon. I am thinking of two cases where the claimant was represented by an attorney. And I remember the names of the cases, the Bay case, B-a-y, and the Sanders case, S-a-n-d-e-r-s.

Both cases, I felt, were supported by excellent briefs, very thorough, very detailed, making lots of citations, making lots of references to VA directives, supporting these with expert opinions, et cetera.

[234] * * * * *

Q. Now, at the regional office level, how frequently are experts employed at the hearing state? Have you ever seen an expert?

A. How do you mean, from our requesting it or the claimant requesting it?

Q. The claimant offering an expert on a question.

A. Rare.

Q. Have you ever seen one?

A. Personally? I haven't see one.

Q. And has anybody ever told you about an expert appearing [235] at a local hearing?

A. Oh, once or twice, something along that range in two years.

Q. Now, I believe yesterday, in connection with the Al Maxwell case, you indicated that a medical opinion issued by Susan Lambert was something that I believe you stated approached giving rise to a question of reasonable doubt. Does that correctly state what you said? To the extent it's inaccurate, why don't you just recapitulate?

A. No. It's substantially what I said.

* * * * *

Q. My question is meant to be limited to a specific medical opinion rendered by an expert either verbally at a hearing or by way of a report dealing with the specific facts and circumstances of the claim. Is that very rare?

A. Yes.

[240] * * * * *

Q. Now, are you aware locally of any applications for the $10 fee by an attorney; in other words, applications for the—to be approved by the statute?

A. Yes.

Q. How many are you aware of?

A. One.

Q. Going back to your 15 years in the VA, how many are you aware of?

A. Absolutely aware of just this one, recently.

Q. So I take it by that that they're not very common?

A. No.

Q. And can you explain the circumstances under which the $10 fee was requested, the one you referred to?

A. An attorney had represented a veteran knowing that that would be the fee limitation, and the claim was allowed, and the attorney asked for the fee that is payable on allowance of a claim.

Q. Did that surprise you?

A. Yes.

Q. Why did it surprise you?

A. It's hardly worth the cost of correspondence.

Q. And what was your understanding as to why he went ahead and asked for the $10?

A. I would imagine that it was a way of expressing—Well, [241] I really shouldn't say, because I don't have any

idea what the attorney had in mind. Didn't seem to be a case of harrassment because all the correspondence from the attorney had been quite reasonable and polite.

But it was there. We had to go to the book and dust off the pages and research how to make that payment. And we finally did decide—did determine how it should be paid. It cost maybe $50 in manpower to determine what the procedure was.

Q. And so I take it you'd agree with me that the $10 fee limitation, in actual fact, works out to an outright prohibition on payment of fees for attorneys, in actual fact?

A. Payment of fees. Not representation, but payment of feels, yes.

[242] * * * * *

Q. Now, in the case of a denial of a claim, there's no fee allowable at all; is that correct?

A. We don't pay for failure.

[247] * * * * *

Q. Well you would assume, would you not, that if the fee limitation were removed, that attorneys would become as expert or more expert in the government VA regulations as are service representatives, would you not?

A. They could be if they desired to specialize in it and if they made day-to-day contact with the regional office to get the latest productions. We get, on the average of any given week, three or four new policy statements. One of the most demanding things about the job is just to keep up with new directions coming in.

[258] * * * * *

Q. Is there any respect in which the VA regional office is hostile toward attorneys representing claimants?

A. We have some detaled guidelines on how to deal with attorneys, and we are careful to instruct our employees not to respond in kind or not to respond in the same tone.

Frequently, a letter from an attorney will be rather harsh sounding, rather demanding, and an employee will respond in the same tone. And then everything goes down-

hill from there. So we're very careful to advise them to state the facts and be respectful and fully informative.

A major problem is not telling the attorney enough. Some employees are very reluctant to disclose a lot to an attorney based on his initial letter, and they don't—they aren't as familiar as they should be with some of the fine print. So that's been a subject of training.

* * * * *

VOLUME III
DEPOSITION OF THOMAS A. VERRILL
JUNE 17, 1983
(CAPTION OMITTED)

[272] * * * * *

Q. Now, with respect to your earlier statement that the claimant could have a hearing at any time, if I might refer you to Exhibit 17, Part 1, which should be in front of you. It's one of those stacks. I'll read it to you out of my volume here.

[273] Are you familiar with M21-1, Change 320, dated January 5th, 1982, Section 18.18, which is at page—at Exhibit 17-152, which states, "a. General Policy." Under (1):

> "The due process requirements stated in VAR 1103 are for application throughout the adjudicative process. An integral part of due process is the right of a claimant, upon request, to a hearing at any time on any issue involved in a claim within the purview of VAR's 1000 through 2899 inclusive."

Are you aware of that provision?

A. Yes.

Q. And do you agree that an integral part of due process is the right of the claimant to request a hearing at any time on any issue?

A. Yes.

Q. And handing you what's been marked as—previously as Exhibit 17-137 through 17-138, can you identify the handwriting on that document?

A. Yes.

Q. Whose handwriting is it?

A. That's mine.

Q. And did you prepare that document?

A. Yes.

Q. And was that distributed to section chiefs in the regional—Northern California regional office?

A. Yes.

[274] Q. Was it reduced to a typewritten document—

A. No.

Q. —or was it sent out in your own handwriting?

A. It was produced in this manner.

Q. Okay. And can you explain the circumstances under which you sent out documents of this type?

A. Well, let me read it.

At this time, as I recall, we had a high backlog in the rating boards. And I suppose we had a high number of requests for hearings. I would point out that anything handprinted like this and passed around as a note is an informal, non-controlling statement. It is not a directive that is intended to be binding over a period of time. This was a temporary expedient.

Q. Did you ever rescind it?

A. I don't believe I did. I wouldn't rescind something so informal.

Q. And is it still the practice in the local—in the local Northern California regional office for—or a requirement that the signatures of a section chief be obtained for all requests for a hearing prior to the time an original decision is made?

A. We screen requests for hearings through section chiefs. I don't know that we require a signature, but section chiefs do see the request for hearings, yes.

Q. And in what way are the resources locally limited with regard to provision for hearings at the predetermination stage?

[275] A. It's just a matter of having a limited number of people for potentially unlimited number of claims and requests for hearing.

Q. You believe you have—you don't have the proper resources to provide hearings for all cases in which the claimant requests them?

A. Well, the frequency of requests is so low that I'm not prepared to say that we lack adequate resources at this point in time.

Q. Well, what about from time to time? Do you conclude that there are periods of time in which your resources are inadequate to provide hearings to all people who request them?

A. Apparantly I thought so at that particular point in time. I believe that is—

Q. April 20th, 1981.

A. April '81. At that point in time, I must have felt that our resources were being strained. I wouldn't say that now, and I'm not prepared to project that we'll have a similar situation in the future.

In any event, on the question of hearings, I'd like to point out the practical experience we have in adjudication would encourage us to guide the claimant into a hearing at the point where it really would become potentially decisive.

By that, I mean, that from time to time, infrequently, but nevertheless from time to time, we get a request for a hearing before we've made a decision. The second chief will review that request and review the claims material and decide that in all probability, we will have a grant. And where [276] that's the case, we would suggest that the question of a hearing be postponed until we've made a decision.

Q. Isn't the predetermination stage the most meaningful opportunity the claimant has to convince the VA of the merits of his claim?

A. Not necessarily. The facts speak for themselves. In so many cases, the great bulk of cases, it's a simple question of reviewing medical records. A person may claim that he lost a hand in medical records in service. Service medical records show that he lost a hand. We're waiting for the VA records to show the current degree of disability resulting from the loss of that hand.

In this case, if a claimant should ask for a hearing before we get that VA examination back, the hearing would serve no purpose. It would inconvenience the claimant and do nothing to effect the decision. The decision is cut and dry.

Q. Well, what about—I'm sorry.

A. Well, I'm just saying that we try to exercise good judgment in the management of our resources. And where we have a probable grant, there is no point in having a hearing other than providing an opportunity for a social get-together.

Q. Now, in the instance where a claim is initially denied, wouldn't you agree with me that the claimant is facing an uphill battle to get the VA to change his decision?

A. Yes, ordinarily, if we've made a good decision. Yes.

Q. And at that point in time, with respect to those cases that are denied, wouldn't you agree that the interest has an important—the claimant has an important interest in [277] obtaining a predetermination hearing?

A. Well, it wouldn't be a predetermination hearing at that time. We've made a decision denying benefit. I think what we're getting into is our policy of encouraging a hearing after a statement of the case.

We do that for the simple reason that if we had a hearing before the statement of the case, the person would then be entitled to a hearing after the statement of the case. We'd end up with two hearings in every case. And it's just not practical.

Q. Well, the—The government regulations, including the VAR 1103, and the section of the M21-1, which I read to you previously, require that a claimant be allowed a hearing at any stage in the process, whether it's one, two, three or ten, do they not?

A. Yes. It says the person is entitled. What we do is, where a hearing has been requested, we will make the effort to produce a statement of the case and remind the claimant that they have asked for a hearing and they may proceed with a hearing after reviewing the statement of the case.

A person is not really well prepared to proceed with a hearing until they have the statement of the case which explains all the law and all the facts on which we made our decision. The person then is free to review this and present a set of facts at a hearing that would counter our position.

This really is a matter of being better prepared to proceed at that stage after getting a statement of the case.

Q. Well, I understand that that's perhaps your position, [278] but wouldn't you agree that there are occasions on which the claimant disagrees with that?

A. Yes, from time to time. Keep in mind that the frequency of requests for hearings is very low to begin with. The frequency of requests for a hearing on a whim at any time during the claims processing is even less common. If a person is persistent, they will get multiple hearings if they

want multiple hearings. But that right could be used merely to harass us.

MR. ERSPAMER: Off the record a second.

(Brief discussion off the record.)

MR. ERSPAMER: Can I have the last question read back.

(Record read.)

MR. ERSPAMER: Q. Well, I take it from your answer that the local hearing—Excuse me—local claims officers are hostile to multiple requests for hearings?

A. I wouldn't say hostile. They're interested in being practical. The claimant is not aware of whether the hearing is going to be to his advantage. As I said, before a statement of the case, they don't have a set of facts and laws that would be useful to them in presenting a counter-argument.

So it's our practice to proceed with the hearing after a statement of the case has been issued. It's not a matter of being hostile. It's just a matter of being practical.

Q. Well, would you agree that the adjudication personnel discourage multiple hearings?

A. Well, I'm not sure I would express it in that way, but [279] we—we try to get the most practical effect out of the hearing time that's available to all claimants.

Q. And directing your—reading from the attachment to your memo of April 20th, 1981, which is—I think you've written across "Sample and Reminder," which is—I'm reading from Exhibit 17-139 from a form letter.

Specifically, it states:

> "Your request for a hearing will be considered at a later date. We do not normally grant hearings before the original decision is made. If this decision is not favorable to you, you will then have an opportunity to file a Notice of Disagreement and initiate an appeal. Hearings are offered as part of the appeal process."

Would you agree with me that if that was sent out to a claimant, it might lead him to conclude that a hearing was not possible at the local level?

A. Could I see that?

Q. It's the second paragraph.

A. And the question, again?

MR. ERSPAMER: Read it back.

(Record read.)

THE WITNESS: The letter actually states, quote, "We do not normally grant hearings before the original decision is made," unquote. I don't think anybody would necessarily read that as a prohibition. It just says that we normally don't [280] grant them, the reason being, of course, that the decision might be favorable. And then the person will have gone to the inconvenience of the hearing to no avail.

MR. ERSPAMER: Q. And so you conclude that the statement that hearings are offered as part of the appeal process would not lead a claimant to conclude that he cannot obtain a hearing locally? The last sentence of the paragraph.

A. That sentence is incorrect. Hearings are offered as part of the claims process.

That letter is dated 1977. It's a Philadelphia letter. And I have not sanctioned the use of such a sentence in correspondence from San Francisco.

Q. Well, this letter was an attachment to your memo of April 20th, 1981, was it not? And it's entitled, "Sample and Reminder," and it's referred to in your handwritten letter which is on 17-137 and 17-138?

A. I don't know that it was an attachment to it. Somebody might have stapled the two together. One was issued in '77 in Philadelphia. The other, in '81 in San Francisco. I don't know that this—this doesn't refer to an attachment, does it, my handwritten note?

Q. Let me look at it. First of all, for the record, it was produced to us in the form of an attachment. But let me ask you another question.

Now, you're not suggesting, are you, that the handwritten language, Supervisors and Senior Adjudicators and Rating Board Chairmen, Sample and Reminder—you're not suggesting that the handwritten portion on the document [281] that's been marked as 17-139 was on the document in 1977, are you?

A. Yes, I am. Or within a period between 1977 and the date I left Philadelphia. I don't think I would use a

Philadelphia letter in a San Francisco situation. It would just tend to confuse people.

Q. Most of your forms that you developed that have been marked as Exhibit 18 stem from your Philadelphia experience, do they not?

A. Are you talking about pattern letters?

Q. Pattern letter, yes.

A. As I testified before, the pattern letters actually are a composite selection from a number of different offices, New York, Philadelphia, Cleveland, Ohio, and ones created in San Francisco. But they're all revised from time to time.

And I can assure you that in no current pattern letter would I sanction the use of that particular sentence which states that hearings are part of the appeal process. That's incorrect.

Q. Can you explain why then in the section of your personal copy of M21-1 in front of the section called Chapter 18 on appeals, the—this particular letter followed directly after your memo to the section chiefs that is marked as 17-137 and 17-138?

A. That's the problem of taking my personal manual to use in this manner. I have a habit of keeping papers relating to my various actions over the period of my career, and I keep them. I have an extensive file of past actions. And it [282] doesn't mean that they're necessarily practices in force. That's just my personal decision to retain that. I don't know if it has any more merit than what you would apply to a scrap book.

Q. Well, you—

A. There's nothing—

Q. Is it your testimony that the form which is attached followed directly after your memo to the section chiefs was not a part of the memo you might send to the section chiefs?

A. Yes, but you found them side by side in my manual just because I had retained them in that order.

There's nothing of a personal nature in that manual which is controlling. The only controlling things are the printed portions of the manual or official typed memoranda. As we discussed the last time, from time to time, I issue what are

called adjudication memoranda. Those are a official controlling statement.

These handwritten notes that you are finding in my manual represent situations that may have pertained only momentarily.

Q. And so it's your testimony then, I take it, that the employees of the Adjudication Division who received this memoranda, which is 17-137 to 17-138, were free to disregarded it?

A. That is the handwritten memo to section chiefs only?

Q. Yes.

A. Not the letter?

Q. The handwritten memorandum, whatever accompanied it. [283] But the handwritten memorandum is what the question refers to.

A. At the time that was prepared, it would be accepted by the section chiefs as something to consider when they were deciding whether or not to honor a request for a hearing. Whether or not they would retain that—the office didn't retain it—I can't tell you, but it was only a statement of what we were actually doing anyway. It probably reflects accurately the attitude we had at the time. I don't deny that.

Q. Well, you describe it as something—an informal memorandum. My question to you is: Does the relative informality of it and the fact that it's just handwritten rather than in a typewritten form, does that, according to your testimony, given the section chiefs who received it permission to disregard it?

A. They would weigh that statement against all other directives they had on the subject and exercise their own judgment in a particular case as to whether to give significant weight to that. If I wanted that to be given controlling weight, I would produce it as a memorandum. If I wanted to bind the section chiefs, in other words, to that policy, I would have had it typed. I have available any number of typists.

Q. So when you stated in your memorandum, "To effect this change in policy, employees will obtain the initials of a Section Chief on all requests to 21 to schedule a hearing,"

you were not communicating a policy change in your position as adjudication officer to your inferiors in the adjudication [284] process?

A. Well, I don't know the sequel to that, whether I published some procedures or not. But I can tell you the current procedures are that the section chiefs review requests for hearings. And they refer the requests that they feel should be scheduled to the secretaries.

Q. So if I understand you correctly then, the VA personnel are the adjudicators of when and where a hearing will be held, and not the claimant?

A. Well, the claimant doesn't necessarily understand what is involved in the request for a hearing. It may be, as I pointed out, superfluous. Why have a hearing when the law provides that, in a pension case, if your income is $3,028, you will get 200 a month?

Having a hearing on—in that type of situation, it's superfluous. So we exercise our experience and our understanding of the situation to the advantage of the claimant.

MR. ERSPAMER: Okay. I'm going to move to strike the answer as non-responsive, and I'll ask you to read it back to the witness.

(Record read.)

THE WITNESS: Well, the question was where and when. Where, of course, is at the regional office. When is according to our hearing calendar, and we do notify the claimant and advise him that if that is not convenient, then he should, or she, notify us and we'll set a different time.

MR. ERSPAMER: Q. I don't think you understood my [285] question. Let me rephrase it. The situation which I'm inquiring about is where a claimant requests a hearing. If I understand you correctly, it is not your practice to, in all instances in which a claimant requests a hearing, to honor that request, but rather, to review it, and the local adjudication office personnel decide whether or not the request will be granted?

A. Yes.

Q. And in your estimation, is that consistent with VAR 1103 and the Regulation 18.17 a.(1), which I read to you earlier?

MR. STOLL: Did you call it a regulation? I thought it was in the handbook.

MR. ERSPAMER: Excuse me. Yeah. It's M21-1, and it's, for the record, at Exhibit 17-50.

MR. STOLL: Which is, what?

MR. ERSPAMER: Which is 18.17 of M21-1 under a. And—

MR. STOLL: That's called a handbook or manual?

MR. ERSPAMER: Just a second. I'm not sure if that's the right. Excuse me. It was 18.18 at 17-151, where it states:

> "The due process requirements stated in VAR 1103 are for application throughout the adjudicative process. An integral part of the due process is the right of a claimant, upon request, to a hearing at any time on any issue involved in a claim within the purview of VAR's 1000 through 2899 inclusive."

[286] Is it your testimony that the local practice which you just described is consistent with M21-1, Section 18.18, which I just read to you?

A. We don't interpret that provision to require a formal scheduled hearing whenever the word "hearing" appears in correspondence. We exercise our judgment in determining whether a hearing would be appropriate at that particular time.

Q. And where in the regulations in the M21 or the other procedural rules and regulations does it give the local office the power to exercise its discretion on requests for hearings?

A. It's a matter of practice. We've never scheduled a hearing on viewing the word "hearing" in correspondence at any stage in the processing of the claim. If we did, ordinary claims processing would come to a halt. That's not true, because we don't really get many requests. But we try to be practical about it.

We would have complaints. We are not a formal or judicial court type of situation where if you asked for a hearing, I imagine, in a court case, you would be scheduled and you would have one hearing.

In our situation, you can have a hearing at any time on any issue. That's the basic rule. But that doesn't mean that we shouldn't exercise our judgment in protecting the claimant against his own lack of knowledge.

I keep repeating, why give a hearing if we're going to make a grant. Or there is a situation where we have made a [287] decision and we have a notice of disagreement with a request for a hearing, there is no point in proceeding immediately with that hearing before we issue the statement of the case.

It's our practice to issue the statement of the case and then grant the hearing. If we did otherwise, we'd have two hearings. And the same material, the same testimony would appear at both hearings. It would be repetitious for us and the claimant. It's not in the claimant's best interests.

Q. So I take it you can point to no authority in the VA rules and regulations which gives you discretion to deny a request for a hearing?

A. Not specifically. It would depend on the definition of "a request for a hearing."

Q. Well, I'm asking you to assume that a request had been made for a hearing. Can you point to any authority which gives you discretion to deny that—or defer that request for a hearing?

A. We can't deny it or ignore it. There's nothing that says we can't defer it to a more appropriate time in the best interests in the claimant, which is after the statement of the case, which gives him the factual situation as we interpret it with the rules and regulations, so that he can prepare himself for a hearing.

Q. That was not my question. I didn't ask whether there was anything that said you couldn't defer it. My question is: Is there anything you can point to in any VA policy manual, procedural manual, regulation or so on, which gives you authority to defer it or to deny a request for a hearing?

[288] A. There's nothing that vies us authority to deny it. There's nothing specifically that addresses a question of

deferring it. But a defferal is not a denial. There's nothing that says, as you might have it, that when we get a request for a hearing, we will stop all other claims activity, schedule a hearing immediately, and do nothing else until the hearing is completed.

Q. So you interpret the regulation which provides that the hearing is—Excuse me—the claimant is entitled to a hearing at any time on any issue involved in the claim to allow you to defer that request for a hearing to a later stage in the process?

* * * * *

THE WITNESS: In effect, because we don't interpret it as an instruction to drop everything and schedule the hearing immediately.

* * * * *

[289] Q. So by your answer, I take it you—it's your testimony that the claimant who—whose claim is initially denied and who requests a hearing after the denial and after the—Excuse me—is furnished a hearing after the statement of the case is prepared is in just as good a position as if he had had a hearing prior to the time the initial decision was made? Is that your testimony?

A. I didn't say that he was necessarily in as good a position. It would depend on the facts in the case.

* * * * *

[292] Q. And what is a due process situation?

A. A due process situation is where you have information from a third party, generally, that suggests that the benefit is being paid improperly, that the person has no entitlement or has reduced entitlement. And we give the person a due process notice before we take our actions.

We advise the person of our proposed action, allow him 60 days or 30 days to respond, and advise him that he can have a hearing. In that situation, in no way do we discourage that hearing before the expiration of the due process period.

Q. Okay. That would involve cases of, for instance, severence?

A. Yes.

Q. And it would involve cases of reduction?

[293] A. Yes.

* * * * *

[299] [Q.] Do you have a place where you keep copies of all the informal directives that you circulate locally, such as the document that was marked as 17-137 through 17-138?

A. No.

Q. Is there any requirement in the VA that you furnish copies of such directives to the Compensation and Pension Service in the central office?

A. I don't make a practice of preparing such informal notes. If there is anything that I want to be controlling and binding and authoritative, I issue an adjudication memorandum.

Q. What is an adjudication memorandum?

A. It's an expansion of a rule to cover a more particular situation. That's roughly what it is.

Q. Can it be an expansion of a circular, for example?

A. Well, if there's a particular situation that is not covered by any of the many directives we have and it is a problem, then I will expand on it in that format. I'm not saying that particular paper that you have is unique, but it's not far from being unique.

* * * * *

[303] Q. Now, the next series of questions is going to relate to record purpose disallowances where there's been a failure to prosecute a claim.

And first of all, can you explain under what [304] circumstances there would be a record purpose disallowance for failure to prosecute a claim?

A. This occurs quite frequently where someone is advised by us that they must produce certain evidence and they don't respond to the letter. We make a record purpose disallowance. The claim is considered abandoned a year from the date of our request.

* * * * *

Q. And it's true, is it not, under the procedures you employ, in the absence of an inquiry, the claimant will not be notified of a record purpose disallowance except where the action is taken because of a failure to report for examination?

A. That's right.

Q. So in most circumstances, the claimant does not become aware that there has been a record purpose disallowance?

A. It's an administrative procedure of little significance. The person is aware that they didn't answer our request for evidence.

* * * * *

[305] THE WITNESS: They're not aware that they have taken the administrative step of removing the control from the file and taking—and that we took our end product. In other words, we got credit under the work measurement system as measured in AMIS, the Automated Management Information System, that we did work on the case that should be credited against our manpower resources to arrive at a productivity figure.

* * * * *

[306] Q. Now, in the case of a record purpose disallowance where the claimant has not furnished information for a year, if he were to re-open his claim, he would not be entitled to accrued benefits back to the date he originally filed the claim that resulted in the record purpose disallowance, correct?

A. If the year has acquired from the date of request, there is no accrued benefit for that period. Should he later establish his claim, it would be from date of receipt of the evidence.

* * * * *

[307] Q. And I take it a claimant can appeal a record purpose disallowance to the Board of Veterans Appeals as a procedural question, or is that precluded?

A. They're unaware of the record purpose disallowance, so there's no opportunity to appeal. All they have to do is reply to request for evidence.

Q. Within one year, and if they don't—what—what about the situation, one year or six months later they provide the information?

A. The request for evidence contains information that they'd have a year to present it. After that year, it would be date of receipt of the evidence. Now, they can appeal

our decision that the benefit may be paid only from the date of receipt of the evidence. They may appeal that. Whether they prevail or not is something else.

Q. Have you ever known of an appeal on that question to be granted?

A. No.

* * * * *

[311] Q. And in the case where a notice of disagreement is not received within one year of the letter of notification of the initial review or determination, under M21-1, the claimant will be informed that the action taken by the agency of original jurisdiction became final at the expiration of that one-year period, correct?

A. We don't notify them that the decision is final without some new inquiry. The original decision tells them that with a passage of a year, the decision becomes final, but after that year has elapsed, we don't write them a letter and tell them now our decision of such and such is final.

* * * * *

[316] Q. And again, you make no effort to go behind the DNA report?

A. We really wouldn't know where to begin to look, is what it comes down to.

* * * * *

[317] MR. ERSPAMER: Q. Handing you what's been marked as Exhibit 84, can you identify that for the record as one of the DNA reports with regard to a test series that you referred to earlier in your testimony?

A. Yes.

Q. And is that the type of information you rely upon in [318] deciding ionizing radiation claims?

A. Partially. Not totally.

Q. Is that the DNA furnished material that you rely upon that you referred to?

A. Yes.

Q. And is a similar volume available for each of the various test programs; for example, Operation Crossroads and the other operations?

A. I believe so.

Q. And how recently were these volumes made available to the local offices of the VA?

A. We've had them about for a few years. Different ones came at different dates. This one's dated January '82. I would say in the past few years. There might have been earlier editions.

Q. And does the VA inform claimants of the availability of such material as a standard practice in the process of adjudication atomic radiation claims?

A. As a standard practice, no. If we rely on that particular booklet, then that would be cited in a statement of the case.

Q. But there would be no standard procedure to provide the claimant with a copy of it?

A. No.

Q. And is a complete set of these booklets such as Exhibit 84 available at the Compensation and Pension Service in Washington, D.C.?

A. I would imagine.

[319] Q. And is there a standard—Is it a standard procedure in radiation cases to inform the claimant of the availability of such material with respect to the test shot that the individual participated in?

A. No.

* * * * *

[326] Q. And can you, again, as you did with Exhibit 10, give us an approximation of how many appealable decisions were made during the period of time covered by the report that has been marked as Exhibit 85?

A. That would be the number 6,489.

Q. Appealable decisions?

A. Yes.

Q. So there were how many total hearings held, again?

A. Well, the heading of the page is missing. That's the problem. But I'm trying to make it out.

Q. How many due process hearings were held, the number that we just referred to a few moments ago?

A. Well, they should correspond with these same headings here, the work units—How many due process hearings?

Q. Yes.

A. 374.

Q. So if 374 hearings were held in 6,489 cases active?

A. Yes.

* * * * *

[328] Q. So of the 199 notices of disagreement you received during the period of time covered by this report, which is Exhibit 85, a number of those you would expect would have been abandoned and no substantive appeal would have been filed?

A. That's right.

* * * * *

[339] MR. ERSPAMER: I think it says—I think it covers just any situation where the claimant shows up at a hearing without a representative, is the way I understand it.

Q. Is that your understanding?

A. Yes.

Q. And how often, in your experience, does this occur?

A. I can't give you facts. I can't give you data on that.

Q. Well, can you give me—Is it frequently, seldomly, half the time?

A. Well, it's in proportion to the number of claimants who have no representative during the claims process. It's common.

* * * * *

[342] Q. Does that set forth the procedures and standards that the VA follows under paragraph 20.03 at 17-190 in the case of false or fraudulent evidence or suspected false or fraudulent evidence?

A. This is obsolete, actually. We now have a circular that we follow in domestid fraud cases.

Q. What circular is that?

A. 20-8230.

Q. Is it common to have a circular amend the M21-1 manual or replace it?

A. Yes.

* * * * *

[343] Q. Are you aware of the instance where a program guide superseded a provision in M21-1?

A. Well, it would do it on a temporary basis until they could revise M21-1 to incorporate the program guide or at least refer to it. But as we explained in the past, quite often, there will be directives pertinent to a particular point in some other book or pamphlet or something, and you have to have a cross index.

We were talking about the authority for requiring hearings after a statement of the case, and we were reviewing Chapter 18 and couldn't find it. But in the course of the afternoon, I found an authority in some other directive, namely, M21-2, paragraph 8.03, which says, quote, "It is normally set at a date," "it" being the hearing, "is normally set at a date after the statement of the case is furnished to the claimant," unquote. It doesn't give the reasoning, but it states the rule.

Q. Can I see that?

A. Yes.

Q. And M21-1, that's from the procedural manual?

A. That's a manual restricted to appeals procedures pretty [344] much.

Q. That refers to hearings on appeal, does it not? The caption is Hearings on Appeal, Section 1?

A. That's right.

Q. So in the case of hearings on appeal, it is normally set on a date after the statement of the case is furnished to the claimant; it is right?

A. That's correct.

Q. And is that referring to—Is this a manual that relates to the Board of Veterans Appeals?

A. Well, we have that manual locally, and it's two-fold. It supplements what we have in Chapter 18. That's the basic point that we have many directives. And it's a matter of knowing all of them that pertain to a particular point.

So it behooves one to keep a cross index. But they are one as binding as another.

Q. So a program guide does not necessarily take precedence over a circular, or vice versa?

A. I don't know—

Q. Is this a ranking, though?

A. Well, the ranking is more in terms of chronology. We go by the latest, the latest directive that's pertinent to the issue.

Q. And that could be in either a circular, a program guide, or a procedural manual or, what, a memorandum from you, I suppose, or from your office?

A. Yes. As I described my memoranda, they would be expansions of very narrow issues not fully covered in any [345] existing central office directive.

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VOLUME IV
DEPOSITION OF THOMAS V. VERRILL
JUNE 21, 1983
(CAPTION OMITTED)

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[414] * * * * *

MR. ERSPAMER: Q. Now, directing your attention to Exhibit 19-174 through 19-175, can you identify that document for the record?

A. The top is missing, but it's a memorandum that I issued regarding PTS.

Q. And that's your signature that appears on 19-175?

A. Yes.

[415] Q. Do you recall when that was issued?

A. I was looking for the date, but I can't read it. I can't be sure. I would say at least a year ago.

Q. And for what purpose did you issue this memorandum?

A. To give some guidance to the rating boards as to what they should be looking for in post-traumatic stress claims.

Q. And what did you refer to in preparing the memorandum?

A. We have a program guide on post-traumatic stress. It has been revised at least once. We have a circular on the subject. And those were the primary sources.

Q. Okay. Directing your attention to Exhibit 5-1 in the other volume there—

A. These aren't numbered.

Q. It's entitled, "Post-Traumatic Stress Disorder Ratings."

A. Yes.

Q. Is that the circular you just referred to on post-traumatic stress that you referred to in preparing the memorandum?

A. Well, I think that the circular post-dated the memorandum.

Q. Okay. Was there a prior version of the circular that you referred to?

A. No, not of this circular, but the program guide.

Q. And directing your attention 19-187, is that the program guide which you just referred to that you referred to, 19-187 through, looks like, 19-189?

A. Yes. That's the revised edition. Yes.

[416] Q. Now, referring to 19-174, paragraph 3b., particularly, the language, "The onset of PTS is a consequence of exposure to a life threatening stressor in line-of-duty," that's listed as a criteria for service connection, correct?

A. Yes.

Q. And compare that, if you will, to the program guide at 19-189, the first paragraph, where it states, "It is not intended, however, that a post-traumatic stress disorder must have its onset during combat." Do you see any inconsistency between the two?

A. No.

Q. And can you explain why?

A. Well, what I say in 3b. is that it's as a consequence of exposure to a life-threatening stressor, and this says that it must—"this" being the program guide—says that it—the onset is not limited to combat.

And then it goes on to say, "or similar life-threatening episodes." It's just saying that the onset is not exclusively in combat. It doesn't have to be only in combat, but any life-threatening episode. And that's exactly what I said. Life-threatening stressor.

Q. In the life of duty?

A. Well, "in the line of duty" just means that it doesn't involve misconduct, such as drunkenness or self-inflicted wounds.

Q. Okay. Referring to your paragraph 3c. at 19-175, which reads, "The absence of a pre-service personality disorder NP diagnosis are a convincing explanation of aggravation or [417] superimposition of PTS symptoms," can you explain the source of that?

A. The source of that is our experience with these claims. We have, in most cases—I shouldn't say "most," because I don't have statistics on it. But in many cases, we find that we have a pre-existing diagnosed, professionally diagnosed, pre-existing personality disorder.

And now there is appended to that a post-traumatic stress disorder. All we are asking for is a convincing explanation of aggravation or superimposition. In other words, we are asking the professional to account for the fact that there was diagnosed a personality disorder. And we want his explanation of how it is that the PTS represents an aggravation of that. It's either expressed as an aggravation or a superimposition.

Q. Now, with respect to 3e. at the bottom of the page, which reads, "No record of significant pre-stressor substance abuse, if present symptoms are substantially drug induced," do I take it by that to mean that the symptoms for post-traumatic stress syndrome occasionally mirror those that relate to drug abuse?

A. I don't know that a psychiatrist would say that, but in—all I can tell you is that in cases where we have a PTS diagnosis, we frequently have drug abuse, and from what we are able to discern from the record, the symptoms are attributable to the drug abuse.

Then we look through the record and determine if there was pre-service drug abuse or pre-stressor, as I say, [418] pre-stressor drug abuse, and determine whether one is a progression of the other.

We don't actually determine that. As I pointed out before, we have instituted here, in San Francisco, an NP review board. This is the type of question that would be referred to the NP review board. It's a complicating factor. There's many complicating factors in PTS cases.

Pre-service personality disorders, anti-social personalities, either pre, during, or following service, drug abuse and the residuals thereof, all tend to complicate the PTS diagnostic picture.

We have conflicting diagnoses in many cases. The psychiatrist will, at one point, describe PTS based pretty much on the personal history from the claimant, but at an earlier date or later date, even, we will have a hospital report or a report from another psychiatrist explaining that the problem is an anti-social personality.

In order to help us resolve, or we use the phrase, "reconcile" diagnoses, we set up this NP review board in San

Francisco. We're no longer making judgements. The only judgment we make is to submit it to the NP review board.

Q. And what does NP stand for?

A. Neuropsychiatric.

Q. Now, it's true, is it not, that it's very difficult in cases where there has been exposure to a stressor in service and substance—Excuse me—substance abuse, to tell which one followed from the other; in other words, whether or not the stressor caused the person to start to use drugs or [419] whether the drugs caused the condition associated with the stressor?

A. It's difficult when you lack any facts on the subject. Commonly, we don't have. We just have the stressor followed by drug abuse. And in those cases, we invoke a reasonable doubt doctrine. We may not even have to do that.

But in cases where we contest the PTS diagnosis, if you will, we do have evidence that something did pre-exist the stressor, that there was drug abuse prior to the stressor, that there were personality problems prior to the stressor. It's only where we have specific evidence of some complicating factor prior to the stressor that we challenge these diagnoses.

Q. And would you agree with the statement that it's more difficult for a claimant to prevail on a PTSS claim where there has been a history of drug abuse?

A. If the history precedes the stressor, yes, it's going to be more difficult to prevail, but it comes down to a resolution of doubt by the professional NP review board.

By the way, this particular exhibit, the handwritten exhibit regarding hearing, has been superseded by later material.

Q. You have sent out a memorandum that revokes this particular exhibit?

A. Well, you asked the same question in relationship to the hand-printed comments I made on the hearings, and the point is that where something is not formalized as an adjudication memorandum, we don't formally rescind it. In the case of the [420] hearing notes, they apparently were never published, so I couldn't rescind them.

In this situation, we have not an adjudication memorandum, as such, but a memorandum. There's a difference between an adjudication memorandum and a memorandum. This type of product would be understood to be superseded by something of a later date.

As I testified Friday, in deciding what to go by in all the many directives we have, the common recourse is the item of the latest date. There is something of a later date here that guides the rating board through the process of resolving a PTS claim.

This particular memo was written before we had an NP review board, and there was little to guide the rating specialists in situations where we had the complicating factors. The material produced by centra! office doesn't really get into the particulars that the rating boards were encountering. It doesn't discuss complicating factors at all, and yet we were running into them all the time.

When you get into drug abuse, it's very difficult, where you have a history of drug abuse before the stressor, as we had in many cases, with drug abuse thereafter, to determine whether the drug abuse was in any way intensified by the stressor or whether the person is just reinforcing an old habit.

Q. Well, what directive or other document replaced this? What is the more recent document you referred to?

A. There is one that was produced in cooperation with me by [421] a section chief that is later.

Q. Do you know what it's entitled?

A. Well, it would have the same title, I believe, or similar title.

Q. Now—

A. It might not have been in the material that you found in my manuals. I don't pretended to keep those manuals complete and current with respect to material other than the printed material in the manual. And I have a memorandum, as I was saying, that's of a later date that is now being used by the rating board for PTS cases.

Q. Do you have a file that you keep memorandums of that type in?

A. We were discussing, again, the other day, whether there are files for informal memos, and I stated that only where they're typed now. There would be a copy of that in a binder that we label Adjudication Memos. I would expect to find it there. I can't guarantee that I would find it there, but I would expect to find it there. I have a copy, in any event.

Q. Would it be possible for you to produce the Adjudication Memos binder?

A. Yes.

* * * * *

[431] Q. I'm going to hand you 38 CFR, Section 3.102, which governs reasonable doubt, and ask you to compare it, if you would, to Plaintiffs' Exhibit 5, which is a DVB circular, regarding post-traumatic stress, and particularly to the Paragraph 3, which we discussed earlier.

And I'm going to read you a particular section. You can go ahead after I read it and read the whole thing if you want to.

> "The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat or similarly strenuous conditions and is consistent with the probable results of such known hardships."

Do you see any inconsistency with Paragraph 3, which states:

> "A history of a stressor as related [432] by the veteran is, in itself, insufficient. Service records must show the veteran was wounded as a result of any enemy action."

And so on. Do you see any inconsistency between that and the section of 3.102 that I just read to you? It's on the last page, second page, near the end.

A. Well, as I review the entire circular, the statement in Paragraph 3 must be supplemented by the statement in paragraph 1.a.(2), which says that objective evidence of a stressor includes, but is not limited to, official service records.

As we apply this circular, what we mean by service records otherwise substantiating a stressor is evidence that, as I was stating that the person was in an organization that

was in a particular place at a particular time, as he relates, and that the probability of that type of situation is evident. That's about the extent of the application of that Paragraph 3.

* * * * *

[434] Q. Do you see any inconsistency between the two? You either see one or you don't see one.

A. We got it right here?

Q. Yeah. Go ahead and read them again if you want to.

A. On the surface, it's inconsistent.

Q. So if the regional office—And I'm asking you to assume this. If the regional office were to just strictly follow Paragraph 3 of the circular, they would not be following the regulation on reasonable doubt?

A. We might be doing someone an injustice in those rare cases where, as I said, there were no complicating factors, the person gives credible facts, which are supported by symptomatology that is obviously post-traumatic stress symptomatology, there's no intervening causes, but there's a total absence of substantitating personnel records.

And you are—Taking it a little bit further than that, you have a situation where personal personnel records don't show that the person was elsewhere but they don't show that he was there, either. You might, nevertheless, have someone who is legitimately suffering from PTS. If you adhered literally to that paragraph, you would be doing that individual an injustice.

* * * * *

[441] A. Well, as you can appreciate, the claims process is a very complicated process, and the claims examiner has no directions other than those that are printed and made available to him. He has no choice but to follow these directives for lack of any other instructions.

* * * * *

[442] Q. Well, below—below that at 19-287, we have a document [443] dated December 28th, 1964, which has the same title. And under that we have a document again with the same title dated February 10, 1966, which is at 19-289. And below that, there's another document, 19-290, with the same title, which is dated May 7th, 1969.

And that's all I see in the section of the manual dealing with management control, quality control, which is Section R, which starts on 19-282.

Is there something else besides this that is in effect?

A. I mentioned it earlier. M21-4.

Q. Oh, I see. So a whole separate manual has been developed?

A. Yes.

Q. That replaces this?

A. Yes. There's a note on the back page at 19-292. I wrote the word "Obsolete."

Q. Okay. That's the one that says, "S Operating Performance," right, that you wrote "Obsolete" on?

A. Where?

Q. Well, the very last page of the exhibit is the cover sheet for "S Operating Performance." That's a different section, isn't it?

A. Yes, but that "Obsolete" might have referred to the preceding. Can't be sure. I don't—All I know is I do not refer to Section R for quality management any longer.

Q. Can you turn, if you might, to 19-279, which is entitled, "Rating Practices and Procedures, Death."

A. Yes.

[444] Q. Can you explain to me what this is used for.

A. Well, it's an explanation of consideration that the rating board should apply in specific situations which are explained in the program guide. It explains the term, "contributory cause of death."

We don't require that a service-connected disability be the sole cause of death or the primary cause of death in order to grant service connection for death. We allow the service-connected problem to be a contributory cause. And then it gives specific situations.

Q. Do you know of any other place in the VA circulars, program guides, procedural manual, regulations, that govern the procedures to be followed in rating practices and procedures for death cases?

A. I think there is a chapter on the manual on death rating.

Q. And that would be in Exhibit 17?

A. I suppose. Let's see. Death ratings, Chapter 56.

Q. What page reference is that?

A. 17-502.

Q. So a claims examiner who is doing the work-up on a death case would refer not only to the program guide chapter we just referred to, but the procedural manual as well, at 17-502?

A. A rating specialist would. These are rating questions.

Q. So a claims examiner would not refer to the procedural guide or the program guide?

A. Not in the process of making the decision as to whether or not death was service connected. That's not his [445] jurisdiction.

Q. Well, what VA manuals does the claims examiner have desk side?

A. The last two words?

Q. Desk side. At his disposal, at his work site.

A. He has the entire M21-1, but the chapter on death benefits that he would refer to is an earlier chapter in the 30s. Let's see. Chapter 33 would be one of them. Chapter 31. There's a subsequent one, too. 37 is on accrued benefits following that. Those are the primary samples.

He may not—That person may not be able to explain who he's to report to.

* * * * *

MR. ERSPAMER: Q. Now, you might refer, if you would, to 17-322, which is in Exhibit 17, Part Two, about one-third of the way in.

A. What was the number again?

Q. 17-322.

A. Okay.

Q. And if you'd look, if you would, to paragraph 34.06, Death After Service, and particularly, small a.(2), Reasonable Probability. First of all, could you read that to yourself under (2) in parentheses, (a), (b) and (c).

[446] A. Yeah.

Q. Do (a), (b) and (c) define the circumstances under which a reasonable probability exists with respect to death, service-connected death?

A. It doesn't completely define it, no. It just means that where you have these factors, you will find a probability of relationship. It doesn't exclude finding a relationship in other situations.

Q. And is there anything in the text of the regulation—of the provision that—which one can point to to conclude that it doesn't include other ways of showing service-connected death? Do you understand my question? Is there anything you can point to in the regulation which says this is nonexclusive, in other words?

A. I can't cite anything at this moment. I knew that—I know for a fact that it's not exclusive. It's not meant to exclude other situations, but it—it's just a requirement that you will find a relationship in these situations.

It's very much similar to the program guide that you were referring to, M-1.

Q. And that was 19-284, I think, if I remember correctly?

A. No. That's quality control. I got it. 19-279.

Q. 279, right.

And do you see any inconsistency between the reasonable probability standards set forth in section 34.06, I guess it's a chapter, isn't it, Chapter 34.06, a.(2), and the reasonable doubt standard expressed in 38 CFR, Section 3, I believe it's 102, which I'll hand you?

[447] A. Well, if you interpret this as being the only situation in which you can find a relationship, a contributory cause of death, it would conflict. But it's not meant that way. It's just like the presumptive provisions of the law. They require a finding in those situations. They don't preclude a finding in other situations.

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VOLUME V
DEPOSITION OF THOMAS R. VERRILL
JULY 8, 1983
(CAPTION OMITTED)

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[462]

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A. Just what I said, that:

"Failure of the claimant to respond to the statement of the case if no response is received within the time provided above, generally 60 days, the case will be closed. The decision of that agency will constitute final administrative action. No control will be established to follow up on whether an appeal is subsequently filed. If response is subsequently received within the original appeal period, the appeal will be reactivated.

"Protest"—That's the next paragraph.

"Protest in cases administratively closed. If, after a case is closed, as provided above, a claimant files a substantive appeal from that decision, the claim will be referred to the BVA [463] for determination of jurisdiction regardless of the interval of time which may have elapsed from date of appealed decision."

And then they refer you to 18.01E,which restricts that application, in effect, to questions of clear and unmistakable error of fact or law. Appellate review will proceed if an appeal is presented from a finding of an originating agency that there was no error in a prior determination.

Q. So the reactivation of the appeal then would be limited to the case of clear and unmistakable error?

A. Well, they could—This suggests that they could protest the fact that the case had been administratively closed, and that, alone, would require review by the BVA, as they say, for determination of jurisdiction.

Q. All right. And that would be a review of the question of whether or not the procedures had been followed and closed in a case?

A. That's right.

Q. And apart from that, the only review is for clear and unmistakable error?

A. Well, the claimants don't use that phrase. That's our phrase. All they have to do is allege error of fact or law.

Q. And what does the standard of clear and unmistakable error mean to you?

A. It's an error that is obvious to any reasonable person.

* * * * *

[482] Q. Now, another thing that I've noticed in reviewing these files is that the one-year presumptive period is mentioned in almost every denial letter. In other words, they say something to the effect that—I'll give you an example—[483] that, "The problems you claim arising out of an Agent Orange exposure were not shown to have been manifested in service of one year after separation from service."

And we talked before in your previous deposition about misapplication of that presumptive period. Have you identified that as a problem with regard to Agent Orange cases where the Adjudication Division relies upon absence of manifestation within one year of service as a basis for denying an Agent Orange claim?

A. The Agent Orange claims are based on, in some cases, no disability whatsoever, and in other cases, on a range of disabilities that staggers the mind. And some of those disabilities would be appropriately denied under the presumptive regulation and some wouldn't be.

Chloracne itself, I don't imagine we would deny it on the basis of failure to show chloracne within a year from discharge. We discussed that, and I think I said something to the effect that it wasn't used much, and yet, in fact, it is used a lot.

But it's kind of a difficult concept to talk about. It's a convenient regulation to point to when you're making a denial in that it gives a neat reason for denial.

* * * * *

[484] Q. But you find, do you not, that adjudication employees often misunderstand the presumption? In other words, if there hasn't been something shown in the service records within one year of service, they use that as a basis for denying the claim rather than just as a basis for not applying the presumption?

A. Well, I'd be repeating what I said before. It's a convenient regulation to point to to deny a claim, and yet, in that very claim, if facts were developed showing the causal relationship to a present disability, well—Let's say, for example, the Center for Disease Control comes back and says that a particular disability, ingrown toenails—bad example but something like that—is due to Agent Orange, then where we haven't had a claim, whether or not they had shown it within the one-year period, they would be service connected. I guess we could say in some cases, the conclusion is correct regarding service connection, but the citation for the conclusion is inappropriate in that it suggests that there must be evidence within that one-year period.

Q. And what type of an error would you characterize that as being if it was misapplied to require evidence within the one-year period? Is that a substantive or procedural or a—I forgot the other category.

A. Judgmental.

Q. Judgmental.

A. I don't know if I can categorize that. It's misleading, perhaps, to the claimant in that he's going to be beating the woods for evidence within the year, and all he really needs [485] is a medical opinion that's acceptable to the VA, that whatever present disability he has is, in fact, a residual of Agent Orange exposure.

* * * * *

[510] Q. And you can confirm that. And you notice, if you would, in Exhibit 162 that Mr. Clay does not examine the witness but just turns it over, basically, to the local board?

A. Yes.

[511] Q. Is that common that that happens?

A. It does happen, yes.

* * * * *

[522] Q. Now, the two files you produced where you indicated you were impressed with the work product of attorneys in your earlier testimony, one related to an attorney by the name of J.M. Weisberg?

A. Yes.

Q. And another attorney by the name of Linda Dankman, D-a-n-k-m-a-n?

A. Yes.

Q. Can you explain why you were impressed with Mr. Weisberg'

A. He's the one who submitted the material from a radiologist or radiation expert in Berkeley, I believe, on the subject of the effects of low-level dosages and otherwise argued effectively at the hearing for a grant of service connection.

* * * * *

[523] MR. ERSPAMER: Q. And in the case of Linda Dankman, what impressed you about the way she handled her representation of the claimant?

A. Well, in that case, I think it was a matter of the brief she prepared. I don't recall Mr. Weisberg's brief so much as I do Ms. Dankman's brief. She went to a lot of trouble researching veterans rules, regulations, laws, and made an argument on as many grounds as she could possibly think of. Most of them were not germane, but she—she tried everything. And she obviously did a lot of research.

Again, it was a pro bono representation from a, in this case, I believe, a sincere conviction that an injustice had been done to her client in the past. We, in fact, in that situation, agreed with her, tried to undo the, as she saw it, the injustice, and did, to some extent, recover a benefit for [524] her client.

But she was not satisfied with what had been done locally. Appealed in the same thorough manner but did not prevail on appeal.

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VOLUME VI
DEPOSITION OF THOMAS R. VERRILL
JULY 11, 1983
(CAPTION OMITTED)

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[546] * * * * *

Q. Do you frequently get complaints from claimants about transcript problems?

A. No. As a matter of fact, we don't. I find this a rather difficult letter to read.

Q. And why is that?

A. Well, it just has so many dates in it. And it's hard to follow where things were at which point in time. It's partly from her confusion as to how the system works.

Q. The author's, you mean?

A. Yes.

Q. What parts of the letter illustrate that confusion?

A. Well, the first part he's talking about a transcript and the dates of the transcript and things crossing in the mail, and then he goes into the Board of Veterans Appeals docket and how that system works, and he thinks that we're misleading him because we hold the cases on the docket. It happens to be standard procedure.

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VOLUME I
DEPOSITION OF MAX R. WOODALL
JUNE 23, 1983
(CAPTION OMITTED)

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[3] * * * * *

EXAMINATION BY MR. ERSPAMER

MR. ERSPAMER: Q. Could you please state your full name for the record.

A. Max R. Woodall.

Q. What does the R. stand for?

A. It's an initial only.

Q. What is your current position?

A. I am the director of Compensation and Pension Service for Department of Veterans Benefits, Veterans Administration.

* * * * *

[4] Q. So you've been in the Veterans Administration for 20 years?

A. Yes. Yes, I have.

Q. And you were in the L.A. office for approximately seven years?

A. About seven. Six something. Six plus.

Q. And of your 20 years in the VA, 18 have been spent at the regional office level, or 17?

A. 17, 17.

Q. And are you trained as a lawyer?

A. Yes. I'm not currently active. I've passed the bar. I'm admitted in Kansas. I went to Washburn University law [5] school in Topeka, Kansas.

Q. And do a number of the people that—number of the adjudication officers and adjudication personnel in the VA have legal training?

A. Yes. There's a number. I can't tell you exactly what the percentage is. It varies from station to station.

Q. And what about in the Compensation and Pension Service in Washington?

A. I have a high percentage of attorneys on my staff.

* * * * *

[14] Q. And I take it you would agree with me then that if someone—if a regional office adopted a policy not to provide a statement of the—Excuse me—a hearing except [15] after the statement of the case, that would be inconsistent with the section of the Code of Federal Regulations which I read to you a few moments ago which provides that a claimant is entitled to a hearing at any time on any issue?

A. That's true, but there is one other manual—and I—I'll give you that citation tomorrow. I think it's in M21-1—that does indicate to a reader that you could ask to have the hearing held after the statement of the case is completed.

* * * * *

Q. Now, the statement of the case stage in the procedure is after an initial decision has been reached by the regional office, is it not?

A. That's true, after the notice of disagreement has been received.

Q. And the notice of disagreement operates as a notice of appeal, basically?

[16] A. That's right. It starts the appellate process.

Q. And so at that stage in the process, the decision has already been reached, and in the instance where there's a notice of disagreement, obviously, the decision has been against the claimant in some way?

A. Well, at least a portion of the decision, you're right, has been adverse.

Q. And if there were such a policy of not providing a hearing prior to the statement of the case, that would preclude the right to a hearing at what is the most meaningful stage in the adjudication process; in other words, prior to the time a decision has been reached, would it not?

A. That's true.

* * * * *

[24] Q. And have you become aware that at the regional office level, adjudication officers occasionally issue informal memoranda?

A. Well, it's—It's not authorized. Yes. I'm aware of two or three instances where they have operated with informal memoranda.

We insist, though—In memoranda, we do not consider that a promulgated memorandum. It must be published and it should have the appropriate number on it. It should have a sequence number and date.

Q. Are you referring to the standards for an adjudication memorandum such as we referred to earlier?

A. That's correct. Yes.

Q. And should be—For instance, handing you Exhibit 89-4, that's an example of an adjudication memorandum?

A. Yes. That's correct. They use the 21 to symbolize the service it comes from. 20 represents adjudication. In this case, they're using the middle two numbers to show the year, '82 for the year.

Q. And you stated that informal memorandum were not authorized. Can you expand on that a little bit—

A. Yes.

Q. —as to the reasons for that, and so on.

A. Yes. Very simply, if you're giving directions to [25] someone and those section chiefs are responsible for that particular area of quality, that directive should be in writing. There should be no question in anyone's mind as to what someone said or didn't say about something this important. We do insist—And if we found an informal directive, we would make that a note of our interview with the director.

Q. Can you describe the instances in which you have found informal memoranda that you referred to a few moments ago, four or five instances.

A. Yes. Well, we found one at—for example, at Honolulu, was what I was telling you about, that they were accepting a notarized document, and we wrote a letter to the adjudication officer.

Q. Okay. Putting that one aside, any others?

A. Yes. We found one just recently in Alaska where they were improperly waiving some cases concerning the—the thousand dollar payment from the State of Alaska. And we recommended that they follow the appropriate regulations and make proper determination.

Q. Any others?

A. Not recently.

Q. So you've never become aware of an informal memoranda from Mr. Verrill to his section chiefs regarding a provision for hearings before the statement of the case?

A. No, not really.

Q. And if such an informal memoranda exists, it would be improper, according to the rules and regulations that you've [26] set down for the Compensation and Pension Service?

A. Yes. Well, let me ask you exactly. Was there such a memorandum issued?

Q. Well, if you'd like, I can show it to you.

A. You made a statement there that no—I understand—There was a letter brought to my attention.

Q. Handing you what's been marked as 17-137 and 17-138, have you ever seen the original or a copy of this before?

A. I have seen the original of this.

Q. And in what connection did you see it?

A. Mr. Verrill showed it to me.

Q And when did he show it to you?

A. He showed it to me today.

Q. Okay. So that was another subject you discussed today, was this particular letter?

A. Yes, it was.

Q. And what did Mr. Verrill have—How did he introduce the subject?

A. He said that apparently, this had been made up by him at his desk. He was talking with his section chiefs, and I don't know why he did it in this particular format, and he did not explain to me why it was not reduced in writing.

But he said he did not—he did not feel it was even promulgated, and it was kind of, as you would say, an informal memo.

I did not have a chance to discuss it with him any further than that. In fact, I thought it was improper where I was coming over to talk with you. I wanted to talk with my [27] staff tomorrow about the question on M1-1 and exactly what kind of problems we may have out in the field.

But you made a comment about "no." Said "no"—I didn't read it that way, about issuing no statement of the case.

Q. Well, I believe it says, "Hearings are not to be scheduled before the statement of the case in all but the most unusual cases."

A. Okay.

Q. That's what I was referring to.

A. So he did leave. In other words, you made it sound like it was just—there was absolutely no hearing can be scheduled.

Q. I think I was referring there somewhat to his testimony in the deposition as well.

So if this had been distributed and I wanted you to assume it had been distributed to the section chiefs by Mr. Verrill in 1981, you would deem this to have been improper?

A. Yes, I would.

Q. And what else came up in your discussion with Mr. Verrill about this letter, this document?

A. Just the fact that we did discuss that the memos are supposed to be typed, dated, and have the number on them, and of course, signed, just like these. And that's what he understands an Adjudication Division memorandum should be.

Q. And did Mr. Verrill indicate to you that he was in any way worried about this particular document?

[28] A. We didn't really have that much time. The time was so short today that we—that we had almost no further discussion on that memo.

Q. Apart from the monitoring functions you described before when you occasionally send a team out to the regional offices, do you have any other mechanism in force by which you can discover or search for problems of this type; in other words, unauthorized memoranda or informal memoranda?

A. We have a checklist we give to our people, and we would be looking for a pattern there. Naturally, we're looking at the volume, for example, of hearings.

Why would the hearings be considerably lower, say, at San Francisco than another station. What bothers me most about this particular memo—And I can't remember exactly what that one sentence said now. Maybe it's the way you

responded to it. And I don't know what he said in his testimony.

This, to me, would tend to have a section chief go in a rather conservative direction as far as hearings are concerned. And we really—As far as I'm concerned, we need to leave the door open for hearings wherever possible. Wherever we can resolve a matter, we should still try to keep those resources available.

Q. And you started to refer to a section here that bothered you the most. What particular section are you talking about?

A. This one here. I guess the sentence—Apparently, the way you also interpret it. See, I didn't interpret it as closing a door. I thought that he just had an informal [29] discussion, and talking with these people saying that he had limited resources and probably trying to hold down what he apparently views as an excessive number of hearings. He's saying hearings are not to be scheduled before the statement of the case in all but the most unusual cases. That's rather restrictive.

Q. And inconsistent, is it not, with the Code of Federal Regulations?

A. Yes. And tomorrow I will be specific about that other manual. We need to discuss tomorrow as far as—We may have one more inconsistency.

Q. With regard to this letter, you mean?

A. Mm-hmm. That's true.

Q. And which provision would it affect?

A. As to whether you have to have a hearing before a statement of the case or should you try to get out the statement of the case first and then have the—a single hearing following the statement of the case.

* * * * *

[37] Q. Almost all of these that are listed here, the skin cancer, the brain tumors, the melanoma, the leukemias, the lymphomas, and so on, those all manifest themselves usually within a latency period longer than one year; isn't that correct?

A. Most—Yes. I think that's true.

Q. And have you run into a lot of instances—First of all, let me ask this: Have you run into any instances in which the—There is a presumption of service connection if certain types of diseases manifest themselves within one year of separation of service, right?

A. That's true. That's contained in Title 38.

Q. And have you run into any situation where a VA adjudication officer has misapplied that presumption so as to deny a claim based on the mere fact that it manifested itself [38] in excess of one year after separation from service?

A. Yes. We've had at least one or two—It's a rare error, but it has occurred.

Q. On what basis do you say it's a rare error?

A. I can't—I've only seen one or two of those in the two years I've been in Washington.

Q. What about when you were in St. Petersburg?

A. Yes. I've—I've seen at less one there, too. It's just a human error. They will overlook—The presumption is there. They're all trained on it. That's one of the things we constantly remind them of in the training.

* * * * *

[44] Q. Okay. And referring again to the Exhibit 61-4, where it [45] states, "There is no evidence of this condition in service or within one year of discharge," that would not be surprising for a cancer, would it, if there was no evidence of it within one year of service?

A. For most cancers, that's true.

Q. And if the—If the local rating board relied upon the absence of evidence, the condition in service or within one year of service in the case of a cancer or other disease with a latency period, that would be improper, would it not have been?

A. I would have to see the case, but it's possible, yes.

Q. Well, I'm asking you to assume that it's a—a cancer with a latency period.

A. Okay. Yes.

Q. If they relied upon that to deny the case, that fact that it—

A. With an extended latency period, yes.

Q. Just so the record is clear, with a cancer with an extended latency. If a regional office, in adjudicating a cancer claim with regard to a cancer that has a long latency period, relied upon the fact that it did not manifest itself within one year of service, that would have been improper, correct?

A. Yes. I think they should have developed it. I'm assuming it's somewhere within reasonable time frames. Now, we're not talking about somebody that was exposed back, say, on the original Atoll Test in 1945.

Q. Well, some cancers have latency periods of as long as 30 [46] years, do they not?

A. That's true.

Q. And that would take you back to the Atoll period, would it not?

A. Well, almost.

Q. Close to it.

A. Yeah.

* * * * *

[48] Q. I'm going to ask you a few questions about another exhibit, and I'll find it, first of all, and hand it to you. It's Exhibit 9, which is a document which relates to the credit, time credit for different functions at the local office which we had marked in Mr. Verrill's deposition. And tell me whether you recognize that.

A. This is the measurement that's given for a particular end product which encompasses all of the portions of that consideration. For example, on the first line, it has, 110, end product for initial compensation. We have a total of 2.84 hours, and 1.27 is for the rating board, 1.27 for authorization, 0.04 for input, and 0.26 for files.

Q. And that represents the objective or goal for the processing—the time for processing such a claim?

A. Yes. that's right. The processing of that claim is approximately that—worth that much in standard man hours.

Q. And the—The claims examiners are reviewed, in part, based upon their ability to satisfy that criteria for time expended on a claim; isn't that correct?

A. I'm sure a portion of their evaluation, yes, must be based on production of end product.

Q. And in your opinion, is 2.84 hours a sufficient period of time to properly develop an initial compensation claim and to do all the things you discussed you had to do to develop a claim?

A. On a difficult claim, it's not, but on an average basis—I was a member of a group that reviewed the work [49] measurement system about two years ago. Yes. On an average basis, it's—it's probably quite accurate.

Q. Okay. Is it a—If I understand you correctly, you're saying as an average of a time actually expended, it's accurate?

A. Yeah. I'm saying that as an average, if you looked at an—over an extended period of time at a number of 110s and if you looked at the simple ones and the complex ones and the MS cases, multiple sclerosis, and the radiation, they will average out to something approximately in there.

Q. And if I understand you correctly, 2.84 hours, in your opinion, is an inadequate amount of time in a complex case such as a radiation case?

A. Yes. In a complex case, you necessarily are going to make up for the easier ones. A complex case could easily take a half a day just to review the folder.

Q. And what happens to the claims examiner who gets a number of complex cases? His incentive is to handle them rather quickly, is it not?

A. I'd hope not. They're under—They understand that they're going to be measured over generally a six-month period. So I would think most of the—most rating specialists would understand that the averages will work out over an extended period of time.

But in one week you could get two tough cases that we'll say the case takes three hours just to go through it and review it and dictate it. Then necessarily, you couldn't have two or three weeks like that and measure that person for [50] a very short period of time, like one month.

It's a valid process if you give it enough time to work, but it must take probably more than a quarter. It would take several months for it to be valid.

Q. So if I understand you correctly, you do believe that 2.84 hours is a sufficient amount of time for the average case to devvelop?

A. Yes.

Q. And what is, in your opinion, the minimum adequate workup of a disability or death compensation claim—

A. Well, you can have—

Q. —that ought to be accomplished in those 2.84 hours?

A. You mean like how many a day? I don't think I understand your question.

Q. No. What types of things ought the claims examiner to do at a minimum in those 2.84 hours to develop a claim?

A. Okay. Well, let me clarify, first of all, that the claims examiner I think I'd be talking about is the rating specialist, the GS-12 type.

Oh, the first thing they would necessarily have to assure themselves of is that they have the proper evidence of service in there and that they do have an adequate supply of medical and service medical records. Are there anything missing. They would have to assure themselves that they have a fairly complete record.

And then they necessarily, in probably consulting with the doctor, would determine whether the diagnosis given to them by the examining physician. And I can't really stress [51] that too much, because remember, they cannot make a diagnosis. The board themselves are prohibited from furnishing a diagnosis.

So that examining physician or treating physician gives them the diagnosis. Then they're going to determine, as you said, go to some other source if they have a problem, or go back to thehospital and decide whether they need a differential diagnosis. That's why I still think that locally, they must have some type of resources to resolve these questions, because that is one of the most important parts of making that determination. Do we have the right diagnosis and do we have the proper evidence to support it.

Then they would also go to the rating schedule and assign what would be the proper percentage for the loss of earning capacity of the average person.

Q. Anything else you think would be the minimum workup that the rating specialist ought to do?

A. Well, that, and of course, the dictating of the rating itself. That's—

Q. Now, that 110 code, that refers more than to just the rating process?

A. Yes. Remember, 110 is going to take in a lot of things. That's the difficult case where the exam has at least one thing missing in it. So you're going to try to move the case along. Sometimes it will be nothing more than a phone call, and you call a doctor and say, "Hey, I think you forgot something here. Let's talk about one of our, you know, leukemia cases." A question comes up that's to a statement [52] in there or a workup on an NP, a stressor, delayed stress. The stressor is not clearly identified.

You try to move the case. So you facilitate it by calling him and saying, "How about if I send it back to you, Doctor, with a note in here. Will you try to clarify this or bring him in for another examination?"

That would be, I would say, an important part of that rating specialist's initial workup.

Q. What I was trying to clarify is that the 2.84 hours listed there includes not only the time of the rating specialist, but includes time of the claims examiner and the case clerk and all these other people?

A. Oh, yes. The 2.84 includes, as you see, includes an equal amount—When it gets out to the authorization section, the adjudicator is going to have to introduce it into the record, it has to be reviewed by the authorizer, and before it ever got to the rating board, your development clerk had to review it. Before it came to the development clerk, they had to build a folder, they had to do the other things to make sure they had a veteran, for example.

Yes. There's a lot of pieces go into it.

Q. Right. And so the 2.84 hours—The rating board couldn't average 2.84 hours. It has to be an average of the whole process?

A. That's right.

Q. And you don't see, if I understand you correctly, incentive on the part of the people involved in the rating

process or the development process to work quickly, [53] given the fact that they are being reviewed, in part, based upon their efficiency in satisfying that criteria?

A. Well, we tried to weigh the two things very carefully, and we—we have not set hard, firm standards at central office. We have given them some guidelines, and they—it has always been told to them that these are to be used as guidelines only. Then they set local standards.

But they also have to meet the quality standards. So locally—For example, Mr. Verrill here is going to have to waive his staffing—his resources, his staffing needs, his training needs, and what his perceived quality is.

Q. Okay. My question, though, is that you disagree with the statement that there is an incentive on the part of the claims examiners, the people adjudicating claims, to handle the claims quickly in order to satisfy this time criteria which is set forth in Exhibit 9?

A. That's right, because if they do that quickly and they cut some of corner, you're going to catch them on the quality review.

Q. Well, not every case is reviewed for quality?

A. That's true. I don't—I wouldn't call it an incentive. I guess if somebody wanted to, you know, as you say, beat the system, they could move some cases and make themselves look better than what they really are. But I think we're generally, at this level, dealing with professional people that are motivated, and I have not seen any—any pattern like this in the country.

* * * * *

[54] Q. And it's correct, is it not, that correspondence does not get any credit in this particular system?

A. When you're talking about correspondence, do you mean the—

Q. 400. The 400 category.

A. That's true. No. There's a—There's a presumption—There's an allowance in that 2.84. I'd have to check with Mr. Nixon as to what percentage of that is already loaded in to take care of ordinary correspondence activity.

Q. Now, I'm going to hand you Exhibit H to the Complaint and ask you to take a look at that, and I realizing it's

[55] probably a document you've never seen before. But just for background, Mr. Reason Warehime is also a plaintiff in this case. And for the record, this is an undated document, but it's Exhibit H to the Complaint from T.A. Verrill to Mr. Warehime.

* * * * *

Q. In your position as director of the Compensation and Pension Service, do you find anything misleading or inaccurate about Exhibit H?

A. Oh, it's not really inaccurate. I could see his point that he's got a backlog here. And I would say it could be more helpful if it was phrased in a different manner, more open to the claimants.

Q. You don't see anything improper about Exhibit H then?

A. I would want our adjudication officers to be more helpful and follow what we used to say a couple of years ago, "May I help you," carry through with that type of an approach to it.

So maybe they could have said some of these things and stressed that to Mr. Warehime, that, still, as they tried to in the closing paragraph, that's the important thing here, is that they did leave him with an open door. And he could come in for the hearing.

Q. Yeah. But it says, does it not, "If we do not hear from you, we will assume you don't want a hearing," basically, is what it says, right, within 30 days?

A. That's true.

Q. Do you think that was proper?

A. Well, I think what you're thinking it should have said is, then why have a 30-day limitation when actually, he has—at least he has the one year—up to a one-year appeal period. I don't know what you said in here has an administrative control, which is apparently what this is based on. I don't know why, you see, set a particular limit, but—

Q. Well, that paragraph puts the onus on Mr. Warehime to again request a hearing, and if he doesn't do it within 30 days, it will result in a waiver of his right to a hearing, does it not?

A. No, he doesn't waive his right to a hearing. He can still come in and have a hearing again.

Q. Well, they say here, does it not, "If you do not respond within 30 days, we will certify your appeal to the Board of Veterans Appeal without further delay for a hearing," right?

A. Yeah.

Q. So they would just go up to the Board of Veterans Appeals if he didn't respond with 30 days, right?

A. That's true. In the VARMS system, the control would come up and it may not be absolutely within 30 days, but within a short period of time after that, it would go up.

* * * * *

[58] Q. And how do you view the—What is your view of the function that a hearing, a personal hearing, serves in the adjudication process?

A. I think it's an opportunity for the claimant and his or her representative to expand the record in any manner they see fit, whether it's just nothing more than to come in and introduce one more piece of evidence or to talk about their own special problems as they see the case. And it really should be as open as possible.

It's non-adversary, so we don't have to worry about formal rules of evidence, and in some cases, we do elicit testimony or we get a track on a piece of evidence that will result in a grant of service connection. I think it's an important took in the adjudication process, and that's why I feel that letters like the one we just looked at s. ould only be used in very rare cases.

* * * * *

[60] Q. And again, in the area of appeals, appellate rights, I want you to assume for purposes of my question that approximately 30 percent of claimants who have filed a notice of disagreement do not follow through with their appeal by filing a substantive appeal. Do you have any explanation as to why that occurs, why 30 percent of the claimants abandon their appeal before it's even heard?

A. Well, in my experience, I've seen a high percentage, relatively high percentage, that, I think most people would agree, have very little merit in them.

* * * * *

[64] Q. And can you explain to me the rationale for not informing a claimant when there's been a record purpose disallowance?

A. Well, in that one case we just talked about where you give them, we'll say, a sufficient number of days, 60 days, to respond, they would still have their one-year appeal period at some—You've got to have a reasonable point to move this thing along.

Now, you could still have, I guess, a follow-up and, say, remind them that your 60 days has expired, or 90 days has expired, and we do certain things. For example, in examinations, we are now instituting a control to remind them that that is a very important date for them and that that examination is set for them. And if they fail to appear for that, in fact, they could be running close to the one-year period after all this development has occurred.

Yes. We probably, in some cases, should consider notifying the person.

Q. Well, regardless of whether there's a—a rationale for bringing a case to a close at some point in time, can you explain for me the rationale for not informing the claimant whether that point has been reached? In other words, when the record purpose disallowance is entered, can you explain for me the rationale why the informant—claimant is not informed of the fact that the record purpose allowance has [65] been entered?

A. The only answer I have for that is that at this point, we have nothing in our system to—to trigger an automatic letter. It would require either a form letter or address the master records in such a fashion to let them know. And as far as I know, we have had no plans to change the program as to—as to this type of notification and trigger a letter when the administrative process is completed.

But I do not have a—

Q. You've got now—Can you justify the absence of such a notice? Just explain what justification, if any, you have for that.

A. Well, it would be very similar to the notice that you'd give a fellow attorney. You give them 30 days' notice

to complete a petition, and if they don't respond within that time, it is—further action taken or the case proceeds on, within a day or two, and at some point, you've got to be able to close the case. And I just don't see why we should have to send correspondence at every stage of the proceeding.

Q. And the effects of the policy of not sending the notice is that the record purpose disallowance is entered without the claimant's knowledge, is it not?

A. Yes, in—except if there's a running award. If there's monetary benefits running, they are told that the payments may be suspended or they are suspended for failure, for example, to report for an examination.

Q. And they know because the benefits are cut off?

A. Mm-hmm. That's true.

[66] Q. And the effect of that regulation is to make the time period set forth in the VA regulations and in the correspondence very significant to the claimant, is it not? In other words, if he fails to comply with them, he gets a record purpose disallowance?

A. That's right, but the claimant still has the ability to come in after that disallowance, as long as they come in within a one-year time period. They can still continue with their claim.

* * * * *

[69] Q. But the claimant is not notified of the fact, even if he doesn't provide the evidence requested within 60 days as requested in the letter, he still has up to one year to provide the additional evidence?

A. That's true. Yes.

Q. Now, in your opinion, what are the problems that veterans have faced in trying to prove up Agent Orange claims?

A. Well, with Agent Orange, it's mostly being able to show that the condition they have really is due to the—the dioxin that's contained in the sprayed material. They quite often will allege certain conditions that have occurred many, many—or not occurred, but have developed many years after their exposure over there. And we do have, in those cases, some success in being able to grant based on something that happened back during service.

For example, on—on some of the cases—We have two liver conditions, PCT, which have been granted, because there was something that was developed during service that indicated we have the acute condition. But PCT is a cyclical type—Actually, it's an acute condition, and it generally goes away within a few weeks or months, and those two cases at this point are not being—they're not receiving any money. They are being carried at zero percent disability.

The chloracne cases are probably of more concern right now than probably any other group because there are a great number of them, and some of them are not typical skin conditions, and they feel, I'm sure, very honestly, that it was due t the—whatever happened in their exposure over there.

But again, we simply do not have the weight. The medical evidence is not there. There are not enough experts that agree that these other conditions can be causally related to the Agent Orange exposure. For example, the birth defects. As I understand it, in talking with a couple of the doctors at the hearing this week, we—

Q. Are you talking about the hearing in Washington, D.C. where you testified?

A. Yes, yes. Well, I was there just to assist. Starbuck was the witness, Miss Starbuck.

They do not have sufficient medical agreement or evidence to show that there is really any statistical significance in the children of the veterans who have been over there and been exposed to Agent Orange.

[71] We conceded, as you know. If they've been there and been in a unit, we don't question the exposure itself. It's just evaluating the present medical evidence to determine whether it really can be related to that exposure.

Q. And it's true, is it not, that the vast majority—I believe all the Agent Orange claims have been denied because upon claim results of the Agent Orange claims have been denied based upon claim results of the Agent Orange exposure to date?

A. Let's see.

Q. If it helps you, I can refer you to another exhibit. You don't know the answer to the question, though, off the top of your head?

A. Well, you said that none had been granted?

Q. Yeah. None had been granted—Some had been granted for reasons other than Agent Orange, but none had been granted on the basis of Agent Orange; isn't that correct? And that's shown in Exhibit 4.

A. Right. The—The grants that are in here have been—

Is this the most recent one you have? This is last year's. That's '82.

Q. Is it?

A. November of '82.

Q. That's the most recent one we have, I think. That was produced to us. Do you have a more recent one there?

A. Yeah. I intended to have one. I hope to have it with me. I guess I didn't think we'd talk about that. Well—

* * * * *

THE WITNESS: Yeah. But as you have correctly pointed out, these have been denied in all these other cases because [72] we do not have that medical consensus that would connect the cases with exposure.

* * * * *

[75] Q. And in a lot of these complex cases, specifically, the radiation cases, the post-traumatic stress cases and the Agent Orange cases, experts are really indispensable to success of the claim, expert opinions, are they not?

A. Yeah, they could be. As I said, on Agent Orange cases, quite often, the condition itself, as I said, is poorly, or ill-defined, and you—you simply need help. And many times it will be a differential diagnosis that may resolve the problem.

* * * * *

[81] Q. But in the case of substantive appeal, it would be rare to get a document over two pages which contained a recitation of authorities, and so on?

A. Well, because generally, at that point, all you're doing—We have that document, the form called a 646 when you're getting ready to certify. Really, at that point, you're

supposed to have already reviewed it and you've made your argument beforehand.

So all you're doing is summarizing and making that last [82] statement that you reviewed this entirely and these are those, you know, that last summation of your case.

MR. ERSPAMER: I'll have the question read back. Move to strike the answer and nonresponsive.

* * * * *

THE WITNESS: Generally, the documents—the statements are not over two pages, that's true.

* * * * *

[82] Q. In your opinion, what are the justifications that exist in today's world for the fee limitation?

A. Okay. I'll—I'll list the conditions like this: First of all, we're trying to administer a program with the lowest possible administrative overhead, and generally, trying to deliver the correct benefit within a reasonably short time.

And we feel that our relationship with the claimants and the attorneys and service organizations, the way it's working right now, are just about optimum. And when I say "optimum," I think when you look at our problems in developing the medical records, running down the service records, and we're delivering original compensation benefits within approximately a hundred and some days, less than 110 days from the beginning to the day the first check is made, considering the development of the medical evidence and everything else, I think we're facilitating the claims just about as well as you could expect.

The other part—The other circumstance I'd like to add in concerns this hearing we've talked about today. What I like about the hearing is it's in a non-adversary situation. You're not bound, as I said earlier, by formal rules of evidence. We can take that case, like the ones we've been talking about today, the radiation case and the Agent Orange. We can look at other sources of evidence.

And I do feel strongly about this. I think most of the [84] regional offices try to find other sources of evidence or bases on which to grant benefits.

And I look at these books we're talking about today as guidelines that are not designed to just deny benefits.

They're guidelines to try to develop, and hopefully, pay, a fairly high percentage of the claims.

And I don't know how—If you add either rules of evidence or formal rule-making authority or additional judicial review or you have a higher salaried representative, you could do much better than the way it's going on.

And I really feel strongly about that this year because we've had several outside groups look at our—our programs, and they have found what they said was an acceptable level of quality.

And generally, as we found in the pension review last year, we have some problems in the system where we—we sometimes will have folks that don't report everything to us correctly, but we're generally delivering the right benefit. And under this procedure, we're doing it in a pretty good time frame.

And I guess that's—

Q. And I take it if the fee limitation were removed, it's your opinion that it would lengthen the administrative process.

A. Well, I think that—I'm not saying that attorneys are not facilitators, but I think when you get into the hearing itself, if you—if you make it an adversary hearing, if you have an attorney there, and it still, we'll say, it's not—[85] it's still a non-adversary, I don't see where it would make that much difference one way or the other whether it's an attorney or a well-trained service officer. I think some of the service officers are very well trained.

Q. Well, the Legal Services Corporation report concluded that there was very spotty quality among service officers. Would you disagree with that?

A. Yes, because that's a—that's a pretty strong statement.

Q. You do disagree with that?

A. Yes, I do.

Q. You haven't found uneven quality among service officers?

A. Oh, certainly. Yes. Yes. As a matter of fact, I know some service officers, yes have gone to other endeavors.

Q. Because of their incompetence?

A. Yes, or their—That's right. They either were not doing a very good job or they didn't feel comfortable there or—

Q. Well, you're not suggesting by your previous answer that formal rules of evidence would necessarily accompany the elimination of the fee limitation, are you?

A. No, not necessarily. No.

Q. And you're not suggesting by your answer that administrative overhead would be increased if the fee limitation were removed?

A. Well, maybe not significantly. I just think that we've got a—pretty much an open door, and the claimants generally should feel that they can come in and receive a [86] professional type of service from the organization, even including the veterans benefits counselor in the VA.

Q. Well, you're not saying that, let's say, atomic veterans, for example, thinking that they have an open door as far as their claims for disabilities and death, do you?

A. No. It's obvious, you know, that they're very concerned about, for example, their problems with DNA. They're not happy at all with it.

Q. And then the 99 percent of the atomic veteran claims whose claims have been denied are not—perhaps do not think that they have a, quote, "optimum relationship" in your term with the Veterans Administration, do they?

A. Well, but I still want to add in that you have a great number in there that also don't have a diagnosis. They're just—They're going on record in case something else—

Q. Well, 15—15 claims is not a very high number of claims that have been granted in the atomic radiation area, is it? There's a lot of people who are—who have filed claims who were denied who had a diagnosis, in other words?

A. Right. Now, remember, when you said 15 claims, there's a total of—there's another group over there in BVA that have been granted. It's not a great number, of course.

Q. How many is that?

A. I believe that's—Let's see. We've got 14 here, and I believe it's 15 over there. A total of 29.

Q. And that's not a very high percentage of claims, is it?

A. No.

* * * * *

[92] Q. Do you personally see any advantages to introducing more attorneys into the system for representing claimants? In other words—

A. Well, I like the type of training. An attorney, of course, has an analytical type of mind. They have a—a logical approach. That type of training is useful, and I think that's what the service organizations are trying to do, is develop a—a person that can represent the veteran in that fashion.

* * * * *

Q. Are you distinguishing between a service officer and someone else?

[93] A. Well, I'm thinking about the possibility that some of these people might be just a volunteer at a county. They come in and—you know, a couple or three—but if they're working as a service officer, I do distinguish between a national service officer whose job—whose full-time job is do nothing but to assist in claims and develop evidence as contrasted to a—a county volunteer who just shows up as a kind of a member of the organization and helps once in awhile, makes a phone call or two.

That's the distinction I would draw. I don't see how we can provide that number of copies and keep them up on a regular basis. For example, on the CFR, if you're really going to have a service officer that would have all the tools to be able to represent the claimant, they should have—in addition to the CFR, they should have the manual, too.

Q. They should have the circulars?

A. Yeah.

Q. And they should have the directives?

A. Yeah. And that means you got to keep them up. Because, as you know, you've seen how many changes are already in the manual.

Q. And putting all this material together, the manuals, the directives, the circulars, CFR, and the other sources,

and in the local level, the adjudicative decisions, the local adjudication officer, it's quite a mass of material, is it not?

A. Yes. It's impressive.

Q. And it's difficult to cross reference material, is it [94] not, because some of the material is issued kind of willy-nilly?

A. That's one of the things I'm still working on is cross referencing. Yes. We're trying to do something where we have something like a citation system or really just a simple—like a key system, cross reference.

Q. And if I understand these circulars properly, the circulars are not issued on any regular basis with regard to any particular provisions, but they're just kind of issued where needed?

A. That's true.

Q. And circulars may modify or explain regulations, correct?

A. That's true.

Q. And they may modify or explain a program guide provision?

A. That's also true.

Q. And the same would be true with regard to an interim issue, modify or explain an interim issue?

A. Yes. An interim issue, of course, generally is something that is of short duration. For example, education. Things are in a transition phase so they issue an interim issue for a relatively short period of time.

Q. And it takes a considerable amount of time each year just to keep up a complete set of all these various sources of substantive and procedural delay as applied in veterans cases. Do you agree with that?

A. Well, it's not too bad. It's not like CCH or a Prentice-Hall tax system, but yes, the manual changes quite often, and as we discussed, and also the regulations.

Q. And can you explain to me your understanding of the purpose of service-connected death and disability compensation?

A. Okay. We'll take death first.

Q. Okay. Break it down. What is the purpose of death compensation?

A. Okay.

Q. Service-connected death.

A. Yeah. Service-connected death is to partially make up to that family for the loss of that veteran who would have been there for support, parental guidance, and so forth. It's—It's really a repayment for the loss of this member of the family. Compensation itself, the life compensation, is to make up for the loss of earnings capacity of an average person.

Q. What is that amount currently for service connection?

A. Well, on the hundred percent, of course, it's—it's over 1400 now.

Q. $1400 a month?

A. Right.

Q. I didn't want to interrupt you. I don't know if you were finished.

A. And that's also tax free. So there's a lot of people that don't understand the VA system, thinking that some of these people are overpaid. But remember, when you get up to a hundred percent veteran, you generally talk about a very seriously disabled veteran, and we are talking about the [96] average person. And the one they're generally complaining about is the person that has overcome the disabilities. Maybe a disarticulation of a major—

Q. Are you talking about the disabilities now rather than death?

A. Yeah. I'm talking about—

Q. I thought we were talking about death first.

A. Okay. Lets stay on—Okay. On death, that's a much lower rate of money, of course.

Q. The $1400 was a hundred percent disability?

A. Right. Oh, no. The other one—DIC is scaled by the—by the pay grade of the deceased person.

Q. By the what rate?

A. The pay grade, the relative ranking in service of the deceased veteran. And if it's a—you know, a death in service action. So naturally, the generals would get more money than, say, a sergeant.

Q. What is in a general range?

A. It's several hundred dollars, but it's nothing like the 1400. Let's see. Do you want me—I can get you a range on that tomorrow.

Q. Okay. That would be helpful. And so the disability, though, is by far the main?

A. Oh, by far. Yeah. The DIC is actually—

Q. The DIC is the death?

A. Yeah. DIC is death, and that's only 300 up to a few hundred. So it's just a nominal amount compared to the life compensation.

[97] There are other things in the death compensation, other benefits. The widow, for example, is also entitled to education benefits. She can go back to school. The children, if they're under age 23—If they're under age 26, actually, but generally, under age 23, they can receive counseling, they can also receive educational benefits.

Q. Again, this is limited to service connection?

A. That's right.

Q. Service-connected death?

A. Yeah. I'm staying just with service connection.

Q. That's what I want you to do. What about in the case of service-connected disability? What is the purpose of that particular program?

A. Okay. That program is to repay or make up for the lost earnings capacity of that veteran as measured by the average person. So the person that does have, say, a major disability for an amputation of a leg or an arm. Even though they may overcome that disability, we still pay them that compensation payment, irrespective of what they may have done to adjust or adapt, or, as I said, overcome the residual disability.

* * * * *

Q. And what about other benefits to the family? Are the [98] same benefits available?

A. Yes. For the service—For the live case, we also have benefits for the wife and for the children, and on live benefits, we also have additional compensation available for the aid and attendance of another person. So actually, it can go over 2,000 a month if you have additional disabilities beyond the hundred percent.

* * * * *

Q. Is there service connection—There's no service-connected requirement in education?

A. No. No service-connected requirement on the, what we call, the Chapter 34, the straight education, but the second one, called vocational rehabilitation, is dependent on the service-connected disability.

Q. And so the—The straight education benefits are more like the non-service-connected disability program than they are like with the service-connected?

A. Flat rate—Yeah. It's more like that. And the service-connected education program has two other very important aspects that go with it.

It's keyed to the rehabilitation of that disabled person. So they also get counseling, they also get a, what we'd call, a specialist. They have an education specialist that works with them and helps them through their program, and they even have a revolving loan fund so that these people have more assistance in medical and in counseling areas than the others do.

* * * * *

[100] Q. And can you generalize as to the quality of the representation afforded by the attorneys in the cases that you saw?

A. Yes. It was generally very good.

Q. And can you expand on that at all? Good in what respects?

A. That they—Once they did assume—There was only one case that I remember where the attorney kind of dropped out as far as developing a fairly tough case. In the other cases, they were diligent, they—After they assumed control of the development of the case, they pursued it to its conclusion. And they weren't successful in every single case, but they did a good job of representing the person.

* * * * *

Q. And in your experience in St. Petersburg, did you ever see an attorney actually apply for the $10 fee that's allowed?

A. I can't recall—I think there was one, yeah.

Q. Do you recall the circumstances of that one application?

[101] A. It was a death case, as I remember, but I can't really remember the circumstances. It was quite awhile ago, seven years ago.

* * * * *

[104] [Q.] Now, a high percentage of claims that do go up to the Board of Veterans Appeals are remanded. And by "high," I mean roughly 15 percent. Isn't that correct?

A. Yes. That's true.

Q. And a high percentage of the remands are remands for further case development?

A. Yes. And sometimes it's nothing more, though, than a—an inadequate exam, or there's been something that's been overlooked. Occasionally, it may even be, as you mentioned about the hearings—there's a box on that certificate which tells BVA the person gets a chance to ask for a hearing before it goes up. Sometimes that's not completed. That could be remanded for something that simple.

[105] Q. And approximately 13 percent or so of the cases go up to the Board of Veterans Appeals are reversed outright; isn't that correct?

A. Yes. It's approximately that.

Q. So you're looking at a combined error rate of approximately 25 percent or higher?

A. Well—But remember, that 15 percent remand is—as I said, sometimes is—it's erroneous possibly in some cases where they should have re-examined before they sent it up. That's the one that will show up I guess as often as anything else I can think of. And yes, that would be—I guess—You're talking about an error. But it ultimately does not end up in any monetary change.

* * * * *

[107] Q. Can you give me any instances that you're aware of of unscrupulous conduct by attorneys in the VA claims process setting?

A. No, not recently, no.

Q. Can you give any nonrecent examples?

A. You're saying attorneys versus—

Q. Just attorneys.

A. No, not attorneys, no.

* * * * *

[109] Q. Anybody. There's no procedure by which you can subpoena or request that a person—that such a person appear at a hearing, right?

A. That's what I understand.

Q. And what is the reason for that?

A. Well, I can think of a couple of good reasons. First of all, it would be very disruptive to the office. Some of these people are simply not prepared to handle an adversary confrontation with the claimant. They're a claims examiner that's doing nothing more than introducing information into the Target system, and I don't see where it would assist in the development or aid the claimant's case in most instances.

* * * * *

[114] Q. In your view, has the reasonable doubt standard been followed in the atomic radiation cases?

A. Yes. The ones I reviewed. I think we've tried—Yeah. I know we're talking about a difficult area where there are many complex matters involved as far as developing the information and the evidence, but the ones I've seen that Mr. Macomber has been working on have had a diligent effort applied to them.

Q. And so I take it by the fact that 99 percent of those have been denied that the reasonable doubt cases you reviewed in the area of atomic veterans cases have involved denials, largely?

A. That's true.

Q. What, in your opinion, would be necessary in order to establish an atomic veteran radiation case under the reasonable doubt standard?

A. You would have to have something that would be—I [115] guess to give you a comparable to it, were talking about back earlier today, something where we were so close to a medical consensus that we have sufficient experts that can agree that there is a reasonable relationship, here that the etiology can be established.

That's what I think we're really looking for, to get these experts to agree that there's—and that list you and I talked about earlier.

Q. The program guide?

A. That's right, that there's some of those that we really can't agree.

Q. A lot of cases involving leukemia, which is one of the strongly associated categories, have been denied, have they not?

A. Yes. That's true.

Q. And there's a large volume of medical literature that supports the existence of a causal relationship between exposure to radiation and various cancers, is there not?

A. yes.

Q. Given those facts, what, in your opinion, more do the atomic radiation claimants have to do in order to satisfy that reasonable doubt standard?

A. We've got to have some expert that will agree. And I guess I'm really talking about somebody over there in the Department of Medicine and Surgery that will come forward and say, "This is one of those cases out of thousands that we can see the connection."

* * * * *

[116] MR. ERSPAMER: Q. Are you referring to 38 CFR 3.326(d) where it states, "A statement from a private physician may be accepted for rating the pension claim of a veteran, widow, or widower, a claim for aid," and so on?

A. Yes, but not for compensation.

Q. And it doesn't say, "but not for compensation," does it?

A. Well, okay.

Q. Maybe that's something you can check on tomorrow. But is there nothing you can think of now besides that provision, 3.326(d)?

A. No.

Q. And let's assume for the moment that there is somewhere that states that private medical opinions cannot be relied on. What is the rationale for that, if it exists, either written or unwritten policy?

A. I don't really know on that one. It's a long-standing rule, and I don't know the rationale for it.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOINT APPENDIX

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Volume III

BEST AVAILABLE COPY

175

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-571

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TABLE OF CONTENTS OF APPENDIX*

	Page
Relevant District Court Docket Entries	1
Complaint For Declaratory And Injunctive Relief, with Exhibits A through K, April 13, 1983.....	18
Memorandum Decision And Order denying defendants' motion to dismiss, October 21, 1983	97
Declarations and Affidavits:	
Declaration Of Walter R. Atlee, August 19, 1983...	122
Declaration Of Clarence William Autrey, September 24, 1983	126
Affidavit Of Ronald G. Bakal, March 30, 1983.....	129

*The district court opinion, Order Re Modification, Notice To All Veterans And V.A. Claimants Regarding Hiring Of Attorneys, Order Re Posting Of Notice, notice of appeal from the preliminary injunction, and notice of appeal from the order re modification were attached as appendices to the jurisdictional statement and are not reproduced herein.

Affidavit Of Mary Baluss, with attachments (Affidavit Of Emanuel Staub and Affidavit Of Harold J. Nussbaum), July 1, 1983 131
Declaration Of James L. Bianchi, April 12, 1983 ... 139
Declaration Of John Burke, November 10, 1983 142
Declaration Of Don E. Cordray, with Exhibit A, July 14, 1983 146
Supplemental Declaration Of Don E. Cordray, November 9, 1983 152
Affidavit Of Howard J. De Nike, April 28, 1983 155
Declaration Of Glenn Dorfmeier, July 15, 1983 158
Declaration Of Charles E. Joeckel, Jr., with attachment, November 16, 1983 160
Declaration Of R. Charles Johnson, March 29, 1983 ... 170
Declaration Of Frederico Juarbe, Jr., November 17, 1983 173
Declaration Of Thomas McBee, November 7, [1983] .. 178
Delcaration of Eldon D. Praiswater, November 10, 1983 181
Declaration Of Leonard W. Schroeter, April 11, 1983 184
Declaration Of Malcolm C. Souness, November 15, 1983 187
Declaration Of Richard D. Standefer, November 18, 1983 190
Declaration Of Ralph C. Vaughan, November 16, 1983 192
Declaration Of Reason F. Warehime, with Exhibits A and B, July 13, 1983 195
Declaration Of Doris J. Wilson, July 15, 1983 216

Depositions:

Excerpts from Deposition Of Wesley J. Hawke:
[Volume I], October 24, 1983 219
Volume II, November 3, 1983 226
Excerpts from Deposition Of Thomas H. Jacobson:

Volume I, October 21, 1983 253
Volume II, October 24, 1983 281
Volume III, November 2, 1983 297
Excerpts from Deposition Of Albert Maxwell, June 14, 1983 307
Excerpts from Deposition Of Richard B. Standefer:
Volume I, June 15, 1983 330
Volume II, June 16, 1983 345
Excerpts from Deposition Of Thomas A. Verrill:
Volume I. May 3, 1983 370
Volume II, May 6, 1983 386
Volume III, June 17, 1983 401
Volume IV, June 21, 1983 420
Volume V, July 8, 1983 430
Volume VI, July 11, 1983 434
Excerpts from Deposition Of Max R. Woodall:
Volume I, June 23, 1983 435
Volume II, June 24, 1983 464

Exhibits:

2—Form letter sent by Northern California Regional Office to unrepresented claimants who request hearings 507
4—Agent Orange Claims, November 1, 1982..... 509
9—New Adjudication Work-Rate Standards, effective October 1, 1981 510
17—Excerpts from Verrill's Personal Copy of V.A. Adjudication Manual-M21-1 511
46—Radiation Exposure Claims—Disposition At Regional Offices, March 1, 1983 515
47—Board Of Veterans Appeals Radiation Cases, October 22, 1981 516
48—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), First Quarter, Fiscal Year 1983, March 23, 1983 .. 517

49—Board Of Veterans Appeals—Disposition of Appeals Involving Radiation (Bomb), Fiscal Year 1982, March 18, 1983 518
56—Board Of Veterans Appeals—Disposition of Appeals Involving Agent Orange, Fiscal Year 1982, March 18, 1983 519
57—Agent Orange Claims, March 1, 1983 520
58—Herbicide Exposure Claims, June 2, 1980 521
60—Appeals Statistical Data—Board Of Veterans Appeals, March 28, 1981 522
62—Don E. Cordray's VA Appeal Form 1-9 (Substantive Appeal) 523
63—Board Of Veterans Appeals—Disposition of Appeals by Type of Hearing, Fiscal Year 1982, January 11, 1983..... 525
64—Undated letter to Reasons Warehime from T.A. Verrill, VA Adjudication Officer, re: waiver of personnel hearing 526
65—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing In Fiscal Year 1982 527
66—Excerpt—Percentage Of Appealed Cases Receiving Formal Hearing in Fiscal Year 1977 528
67—Excerpt—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, 10/1/81-9/30/82 529
68—Disposition Of Appealed Cases By Type Of Claim And Type Of Hearing, Fiscal Year 1977 530
69—Board of Veterans Appeals—Travel Boards Representation In Appealed Cases (includes Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976) 535
70—Excerpts from Chapter II, "The Special Legal Problems and Special Difficulties of Access of Veterans" of the Legal Services Corporation

Report To Congress On Access Of Veterans To Legal Assistance, with attachments 542
74—Excerpt—Average Length, In Minutes, Of Claimant Hearings Before the BVA 573
75—Board Of Veterans Appeals—Overall Representation (including Fiscal Years 1982, 1981, 1980, 1979, 1978, 1977 and 1976)..... 574
76—Disposition of Veteran Administration Claims On Appeal, 10/1/81—9/30/82, with Exh. L ... 582
77—Total BVA Cases in 1982 = 35,758, with Exh. J 584
78—BVA Representation In Appealed Cases, 10/80-9/81, with attachment..... 587
99—Excerpts from VARMS Report "PVAR25"—VA Data Processing Center Printout Re: Disposition by Reasons-Quarterly and Cumulative, May 5, 1983..... 589
101—Questions Presented from the Jurisdictional Statement in *Gendron* v. *Levi*, 423 U.S. 802 (1975) 598
115—Letter to Doris J. Wilson from Jack A. Collier, VFW Department Service Officer, re: Personal Hearing, May 26, 1982 599
124—Board Of Veterans Appeals—Informal Hearing Presentation, April 13, 1983 600
126—Excerpts from defendant's letter to Gordon Erspamer, re: supplemental response to plaintiff's first set of interrogatories, July 15, 1983 602
153—Statement Of Accredited Representative In Appealed Case (name withheld), re: Agent Orange, July 8, 1982 606
154—Statement In Support Of Claim (name withheld), re: PTSS Claim, December 9, 1981 .. 607
157—Statement In Support Of Claim (name withheld), re: Agent Orange Claim, July 15, 1981 608

173—VA letter to claimant (name withheld) denying claim for radiation exposure, August 28, 1978 609

177—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26489948), April 20, 1983 610

178—Exhibit to Jacobson Deposition—Statement In Support Of Claim, re: Agent Orange (Claim File No. 26375945), February 23, 1972 611

180—Exhibits to Jacobson Deposition—Appointment Of Veterans Service Organization As Claimant's Representative, September 5, 1979 and Statement In Support Of Claim, June 30, 1975 re: Radiation (Claim File No. 26705288) 612

181—Exhibits to Jacobson Deposition—Statements In Support Of Claim, re: Radiation (Claim File No. 23396989), August 2, 1982 616

194—Exhibits to Jacobson Deposition—Letters to Dan Forest, Disabled American Veterans, December 5, 1980 and to M.H. Tallen, VA Adjudication Officer, December 12, 1980, re: withdrawal of Power of Attorney from DAV (Radiation—Claim File No. XC-5646292) ... 622

Miscellaneous:

Exhibit A to Plaintiffs' Memorandum of Points and Authorities in Support of Application for Preliminary Injunction 625

Letter to Mylio S. Kraja, Executive Director of American Legion from John P. Murphy, VA General Counsel, introduced into evidence at 12/1/83 Hearing, re: Preliminary Injunction, September 27, 1983 628

Excerpts from Hearing Transcript, re: Preliminary Injunction, December 1, 1983 631

Order noting probable jurisdiction 634

Volume II
DEPOSITION OF MAX R. WOODALL
JUNE 24, 1983
(CAPTION OMITTED)

[134] * * * * *

A. Let me clarify on the compensation. Now, this one we have here on—I'm referring to CFR 3.326. We just didn't go far enough. It's covered partially in A and C.

Q. That was where we were talking about whether the VA would consider a private medical opinion?

A. That's right.

Q. And you said that it was your impression that—that the VA would not consider private medical opinions?

A. Right. On C and D, which pertain to this issue, in C, it states that:

> "Any hospital report and any examination report from a military hospital or from a state, county, municipal or other government hospital or recognized private institution which indicates reasonable probability of a valid claim and which contains descriptions, including diagnosis in clinical and laboratory findings adequate for rating purposes, which may be used to rate these cases,"

it goes on and on here, is going back to Section A which does talk about original claims, re-opened claims and claim for increase, including the claims for benefits under 351.

And the only type—The only point in which this refers to compensation is really—These two by themselves do not nail it down, but 3.326(d), as in delta, states that:

> "A private physician's statement may be accepted for rating the pension claim of a veteran, widow or widower. A claim for aid and attendance allowance by a widower or parent or a claim by a child based on permanent incapability of self-support without further examination where it includes clinical manifestations and substantive diagnosis."

And it just goes on to point out that these are otherwise adequate for rating purposes.

A, C and D, when read in their entirety, we have felt all this time, by only citing pension excludes those for compensation purposes.

Q. It's a negative pregnant argument?

A. Okay.

* * * * *

[138] A. Yes. This is the most current report that was available to me when I left. And what I wanted to explain is that the 12 service-connected conditions there, for example, with chloracne, alleged, those were connected by direct service connection rather than by any specific or particular reference to Agent Orange.

Q. Okay. They were the claims where the chloracne manifested itself during a year of service or within a year of separation from service?

A. That's right. There had been an acute episode. The liver conditions downflow, there are a total of 59 liver conditions claimed. We have 26 of those that are service connected. Generally, that claim came up as a claim for the condition itself, and the 26 service connections have been granted as an incident of the military service without any real consideration for them.

Q. Does that include all the liver conditions in the entire adjudication process?

A. No. These 59 cases here are selected out as liver conditions which do constitute a condition that's claimed in a veteran who has made an Agent Orange claim. Probably has claimed that condition now is possibly due to Agent Orange, even though he's already receiving compensation for it.

Q. Okay. So they may not—When initially decided, they may or may not have been decided on the basis of Agent Orange exposure? I assume they weren't decided on the basis of Agent Orange exposure?

[139] A. They were not.

Q. None of them were, correct?

A. Yes. I think that's true. Possibly may have been one early—in a later case that might have had Agent Orange as the initial consideration. But the service connection itself

was granted without respect to the—it was without any basis as far as Agent Orange exposure is concerned.

In the first part, also, with the cancers, where the cancer is alleged, we have a total of 811 case in there. We have 61 melanomas in that group. But there are 37 also in that group that have no diagnosis confirmed.

Again, I think these are veterans that are going on record that if we do develop further expertise in this area, they want to be a part of that consideration.

* * * * *

[143] Q. Well, the basic way that the VA interprets the reasonable doubt standard is to require a reasonable probability, and that's how it's usually phrased, isn't it?

A. Yeah. I think that's—Yeah. In contrast to the reasonable doubt you apply in criminal cases, for example, we're not talking about a standard like that at all. Quite different.

Q. And notwithstanding the reasonable doubt standard, the claims of less than one percent of the atomic radiation cases have been granted?

A. Yeah. Our problem there is more a medical. We don't have the expertise. We need the experts that will give us that relationship. It's more of a medical problem than it is really a truly an adjudicative process.

* * * * *

[144] Q. Now, I'm going to direct your attention, if I might, to Exhibit 17-142, Section 18.04 of M21-1, and I'll read it to you first, and then if you need to, I'll show it to you. Section b, Notice of Disagreement Not Timely Filed.

> "Upon receipt of a notice of disagreement which is not timely [145] filed, the claimant will be informed that the action taken by the agency of original jurisdiction became final at the expiration of the applicable time limit. However, if a clear and unmistakable error is alleged in a prior decision, an appeal may be made from a determination that there was no error."

Does that correctly state the policy and the practice of the Veterans Administration with regard to instances in which a notice of disagreement is not filed within one year of the notice of decision?

A. Yes, it does.

Q. And to clarify your answer yesterday, I understand that from the normal notice that's sent out with a notice of decision tells a claimant that he has 60 days in which to file a substantive appeal?

A. Yes.

Q. And actually, he has a year to file a substantive appeal before the claim will be considered dead?

A. That's true.

Q. And there's nothing in the notice that's sent out that says you have up to one year. You have ten months more than the 60 days that we indicated in your—with regard to the substantive appeal?

A. That's true in the notice, but I think when they file [146] the application, I think they are advised in there that they have one year. But you're correct in the notice.

* * * * *

Q. But the point that I'm trying to elicit is that in the case where there has been a—a record purpose disallowance, the claimant never gets any official notice that the claim has been denied?

A. That's true.

[147] Q. He never gets it?

A. Yeah. That's true. That is true.

Q. So he may go on for years thinking that his claim is still active. He may be laboring under the misconception that his claim is still active?

A. It's possible.

Q. Now, we discussed yesterday some of the complexities with regard to the Agent Orange claims and the atomic radiation claims. Can you describe for me the considerations that apply in cases of post-traumatic stress.

A. Yes. One of the problems with post-traumatic stress is that the examination itself or the development of the claim is inadequate. The stressor, for example—As I said in here in this—this document about reasonable doubt, the evidence of that stressor might be established by nothing more than a fire, say the fire fighting company in—not necessarily a combat area. Or the unit itself was engaged in

some activity. We place them in the area to establish the probability that there was a stressor.

The biggest problem I see with delayed stress is that after we have the examination, we still—by utilizing DSM-III, the new manual, we do not cover all the bases. We do not have a complete examination upon which to base the award.

So we have to go back, I would say, on a fairly high number of cases and ask for additional—either another exam or maybe even a board review of the case.

Q. It's true, is it not, that most local rating boards do not have a psychiatrist on them?

A. That's true.

Q. And are you familiar with the—the circular, VA Circular 21-82-7 of May 3rd, 1982, dealing with post-traumatic stress?

A. Yes, I am.

Q. And I'm going to draw your attention to a particular paragraph of it and ask you to compare it, if you might, to Section 3.102 of the reasonable doubt standard, the last sentence which we read into the record earlier.

A. yes.

Q. And the circular states:

> "A history of a stressor as related by the veteran is, in itself, insufficient. Service records must"—underline 'must'—"show that the veteran was wounded as a result of any enemy action and/or was in combat against the enemy, was a POW or must otherwise substantiate a stressor of sufficient gravity to evoke symptoms in almost everyone as required by DSM-III."

That's Roman numeral three. Now, that seems to require that the service person's records or military or hospital records must show evidence of the stressor; is that correct?

* * * * *

[151] Q. So to the extent that the circular, which is Exhibit 5, does require that service records show the stressor, it's an error?

A. That's true. If that's the way you're reading it, I would say that's an erroneous interpretation of the circular.

Q. And to the extent that that's true, it's inconsistent with the reasonable doubt standard in the regulations?

A. We would apply the reasonable doubt standard in the regulations.

Q. Well, there's nothing in this circular that even refers to the reasonable doubt standard in the regulations, is there?

A. No.

* * * * *

[153] Q. And in cases of conflict between, let's say, a program guide and a circular and regulations, what is the order of precedence?

A. No question. The regulation comes first.

Q. And then what?

A. Then the circular.

Q. Then what?

A. Then the program guide would really be, like, as I said, an advisory, a newsletter-type, a guidance only.

Q. Okay. So the circular which we saw that's Exhibit 5 would control over anything inconsistent in the program guide which, is 19-187?

A. That's true.

Q. Where do adjudication memoranda fall into the order of precedence?

[154] A. They would be even lower than the circular. They would be similar to the program guide.

Q. Okay. Roughly equivalent?

A. Roughly equivalent.

Q. And what about directives? Where do they fall?

A. Now, what type of directives? Like a letter, a directive letter?

Q. Just call it a directive. Yes.

A. An advisory opinion, of course, would be—We would hope it considers the law, and, first of all, the regulations. On that particular case, it would be on that specific case, and then it would be right under the regulation.

Q. Now, I had asked you—started out in this area asking you what were the complexities in PTSS cases, and I'm not sure I gave you an opportunity to respond totally to that.

A. No, I didn't. I was going to tell you more about the process—the examination process and—The elicitation or the development of the history of these cases becomes complex partly because the disabilities in themselves are ill-defined.

The person comes in and says I've got this, I've got headaches, my wife has had, you know, maybe a stillbirth. They have a multitude of complaints. Sometimes it's difficult to determine exactly what they're alleging.

Secondly, when we get into PTSD, we will have multiple diagnoses. We may have—We may have a neurosis, we may have some drug abuse, we may have some alcohol usage. We may also have another—a personality disorder involved in this.

So the NP case can be a very difficult case to evaluate, [155] and sometimes we'll require a second or third examination and may even require what we call a period of observation and evaluation to determine what the correct diagnosis is.

* * * * *

Q. And do you think it would be improper development or inadequate development if a claimant supplied the names of people who were with him in the life-threatening situation and the VA failed to follow up on those?

A. Well, I think I'd have to look at the case and see what type of development had already been done and whether he gave us sufficient information to establish that person. Now, in the Vietnam era veteran, as I said, there's a difference there between a World War II veteran where it would be very [156] difficult, probably unlikely, that everyone is going to be available.

You have an address that is many years old. In the Vietnam era veteran, you probably have a better chance of having current information and success in developing this type of information. And I think, yes, we should go out and try to assist them where possible.

* * * * *

MR. ERSPAMER: Q. Is it up to the claimant, though, to find out where these people are?

A. Well, it's up to the claimant first, yes. I would say the primary responsibility is for the claimant to try to [157] develop the information and the documentation to establish this claim. And then we are secondarily responsible in certain areas. In the civilian area, we would be secondarily.

* * * * *

[167] Q. Well, it would be very simple, would it not, to develop a computer program that could be inputted upon the filing of a radiation claim which would indicate information such as the—the code name for the test shot, the particular unit that the person was on, the disabilities that the person is claiming, the time, programs, of the exposure in inputting other data such as that into a computer?

A. Well, I don't know how difficult it would be. I know right now, for example, that we are just undergoing another master record expansion, and this one, as far as I know, is already committed, because I was wondering about some additional fields for pension verification, and those are critical right now. We need the master record expansion just to cover what our current needs are in the computer.

But again, it's possible. That is a policy decision that would have to be made by somebody else.

Q. And just to clarify the situation as it exists today, that is not done by the VA now with regard to claims when they come in?

A. No. We do not have any way of capturing the type of disability the claims represent until we actuaily get to that first step of the rating process.

Q. And in an ideal world, you as an adjudication—former adjudication officer, as director of the Compensation and Pension Service, would like to have that capability?

A. Yeah, if you had the ideal world, with all the—

[168] Q. And it would help you to adjudicate these claims?

A. I'm not sure it would help—Well, as far as—I don't think we would adjudicate by numbers—

Q. Well, if you found a unit of 12 people that were exposed to—

A. Oh, yes.

Q. All claimed exposure to an atomic bomb test and six of them had leukemia, that would make the claim of each individual person in that group more compelling, would it not?

A. Yes. That's something, as I said, I would refer over to the DM&S to get their opinion on those cases. Yes. That's true.

Q. And you, as an adjudication officer, would—An adjudication officer would want to have that information in order to evaluate the claim of the one out of the six?

A. It's something you may want to consider. Yes. That's true.

* * * * *

[169] Q. Now, what are the current procedures in effect with regard to severance of service connection? Can you just briefly describe them?

A. As far as severance is concerned, we have to have clear and unmistakable error that the original decision was not founded on, you know, valid information, and secondly, we—we exclude mere difference of opinion. Notice must be given to the claimant advising him or her of the intent to sever that service connection, and they are given, again, an opportunity to submit evidence showing why the original decision should be sustained.

So we do that very carefully. And I would hope that in all cases, we are completing our development.

Q. And when severance—When a severance decision is made, it's automatically effective 60 days after it's sent out?

A. Well, it's not earlier than 60 days, yes. It could be deferred. For example, under certain circumstances, we may have to have another reexamination. Maybe we would have a conflicting diagnosis. But yes, your original statement is correct.

* * * * *

[170] Q. Now, apart from Chapter 48 of M21-1, which is 17-403, entitled, "Severance of Service Connection," are there any other sources or standards with regard to severance that you're aware of in the VA rules and regulations?

A. No. That's the important part there. Probably been—There's a—Let me see that citation.

* * * * *

Q. And that provides that if the claimant does not provide additional evidence to show that service connection should be maintained within the 60-day period, quote, "rating actually will be denied and the award will be discontinued within the last day of the month in which the 60-day period expired"?

A. Right.

[173] * * * * *

Q. Now, there are—In the case of service-connected death and disability claims, there are a number of provisions affecting elections that the claimant can make, are there not?

A. Yes, there are.

Q. And what are the basic—the most frequent elections that crop up?

A. Well, one, of course, would be the election between [174] retired military pay and compensation itself. That person that leaves the military service on retired pay can later on decide to elect to receive compensation but would have to give up the retired pay if it's less than the rate of compensation.

The other type of election would be changing from what we call the older protective pension to the improved pension, the current pension law.

Generally, what they would possibly be giving up would be protection of certain assets, net worth assets in return for a possibly higher present rate of pension—of pension.

Q. And so sometimes those are fairly complicated decision?

A. Yes, they are. And the problem with election is that you want to make sure with that person, when they make an irrevocable election, that they're fully informed. That's why it's going to take a dictated letter and you want to let that person know exactly what the results might be, including any possibility of some possible legislative changes that might be imminent.

* * * * *

[182] Q. Well, it was rare, was it not, for somebody to actually go to Washington, D.C. for a BVA hearing, request a hearing, relatively rare?

A. Relatively, yes.

Q. And the traveling panels don't come around too often?

A. They come around once a year.

* * * * *

Q. So if a claimant wants a hearing, a BVA hearing locally, he sometimes has to wait anywhere from zero to 12 months?

A. Right.

Q. And if he just happens to request it two days after the panel has left, he's got to wait almost a whole year?

A. That would be true.

Q. And in the case where a traveling panel hears an appeal locally, that's not necessarily the panel that's going to [183] decide the appeal, is it?

A. Yes. In most cases, it would be.

Q. But not in all cases?

A. No, that's true.

Q. In fact, some of the traveling panels will hear a radiation case locally and then refer the case to the radiation sections of the Board of Veterans Appeals, correct?

A. I'm not personally familiar with how they assign those inside of BVA.

Q. Now, for the purpose of my next question, I want you to assume that that occurs, that the rating board who decides the appeal is not the rating board that heard the actual live testimony. Wouldn't you agree that that disadvantages the claimant and really deprives him of the benefits of a live appearance?

A. Well, we discussed yesterday there would be certain types of cases where there would be an advantage, I think, in being able to present yourself to the panel.

Q. So in a certain number of cases, you would agree, then, it would be a disadvantage to the claimant?

A. It could be.

Q. Now, there are no funds available to claimants from the VA to investigate or develop facts in support of a claim, are there?

A. No. Well, we do provide the travel expenses for the examination, but no. As far as having funds to investigate claims, we do not.

Q. And there's no funds available to retain experts?

[184] A. Well, we do provide field examiners to go out and try to elicit information to assist a person. Yes, we do have that. We have staffing, but it's not set aside specifically for that purpose.

We—We can help. As far as going out, for example, and going through a records repository to assist them, we can, and do, do that.

Q. There's no procedure by which the claimant can incur expenses and be reimbursed by the VA?

A. No, no.

Q. And that includes expenses incurred with regard to medical experts; for instance, if they went out and hired a private physician to make an opinion?

A. That's true. They would have to—Now, that, again, would be a DM&S decision, and they would have to, generally, have that cleared beforehand, unless it's an emergency, which you're really talking about, strictly development. No.

Q. Yeah. Strictly development, where the claimant has—let's say he has cancer and he finds a private medical doctor who's an expert in the area to render a medical opinion. There's no procedure for the VA to reimburse him for the costs he's incurred?

A. No, not for developmental.

* * * * *

[187] Q. Now, I want to direct your attention, if I might, to Chapter 20 of Exhibit 17, which deals with forfeitures.

A. Okay.

Q. Can you, first of all, explain how a forfeiture differs from a severance?

A. Yes. A forfeiture is based on false or fraudulent evidence, and actually, we are cutting that claimant off forever for this type of a benefit.

Q. Is it immediately—effective immediately?

A. We propose—We give them—

Q. I see under 20.03(c), there is a proposed action.

A. We have a 60-day notice like a—like a severance, and [188] then, after that period—after that defferal period of 60 days, the final recommendation will be made.

And then if it's still recommended, the claimant will be advised the decision is based upon the evidence presented, and again, if they—If they want any further information, of course, everything will be reviewed with them, and payments are suspended effective the date of last payment. So then we would be cutting off that—actually at the end of that, roughly, 60-day period.

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[189] Q. Now, directing your attention to Chapter 22 entitled, "Development of Original Disability Claims," which is on 17-196, and more particularly, to Subsection a, which provides, in part:

> "If VA Form 3101 containing complete identifying data is returned by the service department without medical reports to support the disabilities claimed and such disabilities are not shown on the examination at discharge, the claim may be immediately disallowed."

That's a procedure by which a claim for disability is basically short-circuited at early stage in the development process?

A. Yeah. That—That would be probably one where—I guess like a Hiroshima or Nagasaki case where there is no—there are no records to support the claim disabilities.

[190] Q. And might apply as well in a case where all the service records were destroyed in the St. Louis fire?

A. Could. It's possible.

Q. And cases which are disallowed—on this section would be disallowed without any reference to the rating board, correct?

A. No. Well, this would normally be done by a person in authorization that would be trained and skilled in the reviewing of this type of disabilities. But yes. We have made a provision in there for disallowance without formal consideration.

Q. By the rating board?

A. By the rating board. Naturally, when we disallow, for example, it would be a condition that does not have a lengthy latent period, and it simply would appear to that person that there is no merit to this or the medical records, as we say under this section, are entirely negative. There's nothing in the service medical records to support the allegation.

Q. The VA really relies heavily upon the medical and service records in adjudicating death and disability compensation claims, correct?

A. Well, certainly they're given a lot of weight, yes. It's where we start from as far as building the evidenciary basis for the claim.

Q. And in your review and audits of the regional offices for substantive errors and procedural discrepancies, and so on, you've come across a number of instances, have you not, of cases in which the presumption that applies to certain [191] types of claims—Excuse me—illnesses that have been manifested within one year of separation from service have been misapplied?

A. We've seen some, yes, where the presumption has been miss applied.

Q. In fact, a number of the people—adjudication personnel at the offices do not seem to understand that when the presumption does not apply, it does not mean that you automatically deny the claim?

A. I'm not aware of any great problem, but it's possible we have some problems out in the field. And we do pick up a few of those on our reviews.

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[192] [A] There are two types of people out there assisting the veteran in claims. And this would be a good example of something where they'd overlook it. We have what we call the primary, the accredited service officer. That's a national service officer that really submits the claims. Then we have these other people you were told about that are—that are volunteers. They're like a—you use in the law firm, a law clerk, a—

Q. Legal assistant or paralegal?

A. Paralegal. They have limited ability, and some of them, as you said, might even be a volunteer or they're working for the county. They cannot do all of these things that the accredited service officer can do, and they're working as an adjunct to his office. Everything is directed through him.

And sometimes they will not get things into the regional office promptly. We cannot pay until that claim is actually in the hands of a VA official.

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[197] Q. And can you explain for me the basis upon which a decision is made at the VA as to what goes in the program guide as opposed to what goes in the M21-1?

A. We will put in, as I said, generally, advisory material in the program guide, whereas the manual will be a working type manual, and even though it does not have the same weight as the regulations, it is utilized by all of the people in the authorization process, and also, portions of it are also used in the rating process, and the program guide should only be used just for, as I said, for informational purposes or to clarify certain processes out there that are—that need immediate action. And we are not able to make the change in the manual in—in a short time frame.

Q. The program guide is desk side at the claim examiner level, is it not?

A. I would say most—Yes. Most claims examiners have a program guide.

[198] Q. And the VA expects the claims examiners to follow the program guide, does it not?

A. Oh, sure. We're not telling them things to just ignore. That's true.

Where there would be a conflict, for example, if the program guide came out with something and then later on we would try to make the—if there is a--a conflict that really requires the change of the manual, we would accomplish that change in the manual as early as possible.

Q. Now, in your 20 years of experience with the Veterans Administration, have you ever encountered a situation where there was a conflict between the program guide and

the manual or any other conflicts; for instance, with a circular?

A. Oh, yes. I've had two or three in my experience.

Q. Do you recall any, what those are, as you sit here today?

A. I can think back about a couple that came up on income questionnaire review. We will try to—Sometimes there will be a conflict within the manual itself, and you change a Chapter 9 to bring it up to date on the new IQ process. And you may forget another portion of the manual or something in the program guide that needs to be updated.

Yes. It's a continual process. We have to be aware of these all the time, and we try to cross check, and we are working on a cross referencing system that we hope to have in place within approximately the next year.

Q. There are a number of different sources of substantive procedural standards that have been gone through, correct?

A. That's true.

[199] Q. Has any thought been given to integrating this material into one basic set?

A. Well, I'm not sure we can integrate it all into one basic set, but we can certainly try to eliminate the use of, for example, interim issues and changing issues and circulars. Those should be minimized or almost eliminated, if possible. That was one—my task when I first came up to Washington.

Q. You'd agree with me that it gets very confusing when you see all these changes that you have to insert into a manual, would you not?

A. Yes, yes. We're still going to have to change the manual, you know, as legislation changes and everything else. But I'm saying we should try to minimize the use of these extraordinary changes, like, as I said, the interim issues and particular circulars.

Q. And the way a lot of them are handled, it just says, "Delete Paragraph 25.03 and insert new Paragraph 25.03" without giving you a new page to insert in your manual, generally; isn't that true?

A. Well, I hope you haven't had many of those. We try not to.

The other thing is you've got to keep track of these. Some of these have recision dates in these, some of them don't have. A lot of things can happen.

Q. And a lot of the adjudication personnel basically don't keep up to date. They keep everything in their own personal copy of the file; isn't that correct?

A. They're supposed to keep them up to date. That's one of [200] the things they're judged on.

Q. But in a lot of instances, they don't; isn't that correct?

A. Well, from my personal experience, I know that I always have a few people that you had to tell the supervisors to just, you know, keep in touch with them and touch bases with them, not necessarily on every quarter, but on a periodic basis, make sure. Just pop over there and kind of like, say, "Hey, let me see your manual today." You know, "Did you get change 248 posted?" Generally, it doesn't take the supervisor that long to check it out.

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[202] A. Right. Well, as far as the budget—the money for benefits, we really don't look at that. In fact, when we have new types of disabilities that will start appearing, I would say the budgetary considerations, they certainly, later on down the line, if we had a—a great increase in certain types of disabilities, it would be a consideration.

But ordinarily, when you're talking about only three or 4,000 cases, it's relatively insignificant when we're looking at a total of—of a million cases, two million cases, for example, in the total process here in Compensation.

We actually have such a great number of cases that are running, I think what you're thinking about now is relatively insignificant.

A. So even if, let's say, all the 2,000-plus radiation cases were granted, it wouldn't affect the budgetary process very greatly?

A. Well, it would affect it somewhat, but not tremendously. If they're all a hundred percent, of course, you'd have a pretty good sum of money, but they're not going to

be that way, as we know. They're going to be scattered, you know, from ten to whatever.

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MR. ERSPAMER: Q. Okay. I have a few questions. First of all, the question of willful misconduct and vicious habits could apply to almost any time of claim made in front of the Veterans Administration; in other words, any service-connected death and disability compensation claim?

A. It's possible, yes.

Q. And it often crops up, does it not, in post-traumatic stress-type claims where there's been a history of alcoholism or drug use or perhaps even a death case involving a suicide?

A. No. Actually, I wasn't aware of a serious problem in this, not really. I know there's some in it, but as far as being a major problem, I don't think so.

Q. And would you agree with me that there is a—it's often a very complex issue to try to decide what constituted vicious—willful misconduct and vicious habits and what determines the causation question in such cases?

A. That's right. That's why we added—In 1976, we added that section in brackets in 14.04, and we said that that's—14.04c(1)(a):

> "Determinations of willful misconduct in such cases will depend on facts found in individual cases, but care should be exercised to guard against findings of willful misconduct on the basis of inconclusive evidence. An adverse determination requires that there must be excessive indulgence which was the proximate cause of the disability or death in question."

Q. And there's a lot of room for judgment there, isn't there?

A. Yes. This is a judgment call.

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[208] Q. Now, as I understand it, the relationship between the Veterans Administration and the Defense Nuclear Agency with regard to radiation cases is rather one sided. The information comes from DNA to the VA; is that correct?

A. Yes. That's true.

Q. And there's no effort by the VA to communicate information with regard to—it is developed with regard to individual radiation claims and to send that information back to DNA?

A. Well, we'll try to help them from this standpoint: We will tell them what we've got, what we've elicited, and so [209] forth, and try to pin down the unit and the particular exposure, and things like that. So there is a, you know, a—it's a two-way pipeline to that extent.

Q. Well, that's for the purpose of trying to get information from them, though, correct?

A. That's true, yes.

Q. And then my question is: You don't have a procedure by which you sent a copy of all the pertinent exposure information in the file, let's say, affidavits, and so on, that the veteran submits, or statements or testimony that related to a particular test shot and send that back to the DNA once the case is all concluded?

A. No.

Q. And has the DNA ever communicated an interest in receiving such information?

A. I think we probably discussed it once or twice in the last year, but as this memo points out, for about five months now, things have been in kind of a holding position.

Q. And do you know—are you personally acquainted with Lieutenant General, is it Harry Griffiths of the DNA?

A. I'm not personally acquainted with him, but my staff works with his immediate staff on a regular basis. Again, Polcari is my—my contact with DNA on most cases.

Q. And do you know who Polcari's main contact is at DNA?

A. No, I don't. I could—No, I do not.

Q. Do you know who the person is at DNA who's the most knowledgeable about atomic radiation claims and information?

A. No. Right now, I do not know. I think that—I'll [210] just say now.

Q. So I take it from your previous answer a few moments ago that there's nothing about the procedures that

are in effect with regard to gathering of information of DNA that troubles you as an administrator?

A. The way you stated that—There's nothing that troubles me?

Q. Yes.

A. No, I would necessarily like to have better records. We would like to know a lot more about a lot of these cases, to provide to us. I can't agree with that statement.

Q. So there are some respects in which you're unhappy?

A. Yes, and of course, DNA would tell me, "Well, we're giving you all we've got, you know, the best we can do." So that would necessarily then have to go to secondary evidence or some other source.

Q. Are you happy with the rule that limits you to the DNA as a source of information as opposed to gathering information yourself; for instance, from the Reynolds Electric Illuminating Company, the project in Reno?

A. I can't say I'm unhappy with the rule. I can't understand the rationale behind it. I still think we should be permitted to develop relevant, persuasive evidence wherever it is.

Q. And where is that rule that limits you to go into the DNA? Is that in a circular?

A. Well, actually, in the decision—Bear with me just a moment here. The judge said that these documents and the [211] entire—are the internal DNA procedures for calculating the radiation exposures, constitutes the rules, and we should have published those.

Q. Right. But I'm saying, what is the source of the procedure by which you turn to DNA for information? That's what I was asking.

A. Oh, we had a memo of understanding—I'm sorry—between the—

Q. Okay. Memo of understanding? Who negotiated that memo of understanding on behalf of the VA?

A. Probably was Miss Starbuck and probably the early administrator, Mr. Nimmo.

Q. And have you seen that memo of understanding? Is it published anywhere?

A. Well, I've seen it. I don't have a copy of it with me.

Q. Do you know what it states? Can you summarize it, its main provisions?

A. Well, the main provisions, of course, were, you know, for calculating the radiation dosage, and they were going to give us the additional evidence that would—would permit us to try to evaluate the merits of this particular claim. That's a very short statement of what it provided for us.

Q. They're preparing some booklets on each of the test shots, are they not?

A. Yes.

Q. Have you ever seen any of those?

A. Yes, I have.

Q. Do you have a complete set there in the Compensation and [212] Pension Service of the ones that have been prepared to date?

A. As far as I know we do. As far as I know, they are complete, yes, up to date.

Q. They have all—They prepare booklets as to each of the test shots, as far as you know?

A. As far as I know, yes.

Q. And what was your understanding as to the rationale behind the relationship or the memorandum of understanding between the Defense Nuclear Agency and the Veterans Administration?

A. Well, Defense Nuclear Agency had the information we needed, you know, the best source of information. They had the symmetry or the best evidence of it. So it's a logical choice for us to go through as far as development. You had to have the ability to bring this information together in one agency. And I understand that's how the decision was made.

Q. And it's true, is it not, that a lot of this information was scattered among the various Federal agencies. Some of it was in the Department of Energy, some of it was with the Department of the Army, the Navy, and so on?

A. Yes. That's true.

Q. And have you become aware of criticism of the Defense Nuclear Agency and its bias in preparing—in

accumulating that information, in providing that information?

A. Well, the testimony a couple of weeks ago, there was some criticism of DNA. They were saying that there were a couple of the tests were not properly reported or something.

Yes. I know there is some—some criticism of the [213] reports.

Q. And is there criticism of the reports because they only take into account gamma radiation as opposed to other types of radiation such as alpha emitters and other—

A. That was mentioned by one of the witnesses, yes.

* * * * *

[236] Q. So—And in a particular period of time covered by this report in 1983, there were 724 claims closed for failure to respond to the statement of the case as opposed to the receipt of only 64 substantive appeals?

A. That's right.

Q. So more than ten times as many closures for failure to respond to the statement of the case as opposed to actual substantive appeals?

A. Yeah. Now, you could look at that—It depends on, you [237] know, what you're looking for and how you view that. First of all, a positive person would say, "Well, that would indicate that perhaps a lot of those were closed because a statement of the case was very informative and the appellant now understands, you know, why the decision was made."

Q. And other people would say—

A. Right, that a lot of people are just giving up, that they—yeah, they feel that—

Q. Well, a lot of people do give up, don't they, in your experience?

A. Well, I think some do. I don't know how many.

Q. A lot of people get extremely frustrated; isn't that correct?

A. Oh, I'm sure there's quite a few. I don't know how many. Again, it's a—

Q. You've never done any—The VA, according to your knowledge, has never done a study as to why these people are not following through on their claims?

A. No, no. Now, it's interesting to go to this next category, and I was interested in seeing this mass, that the number withdrawn by the claimant and the representative is relatively small. There was none in the first quarter and there were only seven in the second quarter.

Q. So usually, when the ball is dropped—

A. It's just a failure.

Q. —it's just a failure to do something, not a formal withdrawal of the claim?

A. That's right. And then the other reasons which, of [238] course, would cover a multitude of areas.

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[244] A. Yes, it is. This is the Review of Adjudication Operations, and it concerns the VA regional office of San Francisco dated February 11th, 1982.

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[245] Q. And the regional offices are rated more highly if they process claims more quickly?

A. Well, more quickly. We would hope they also do it with quality. It is one of the components that the station [246] director would use to judge the utilization of resources and the adequacy of processes.

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Q. Do you want to just page through this and just describe for the record what these various forms are. Indicate the page for each.

A. Okay. Page 100-2 is an analysis by subject. The first part of it talks about quality of service and end product. It gives the relative timeliness. Then the second portion gives the quality levels in ratings activity, and the next is authorization's quality levels.

The next major category is personnel management and utilization. Gives a breakout of the man hours devoted to training compared to the western average and the national average. Employee utilization is also compared with the national averages, which, in this case, was—

Q. Very close?

A. Yeah, very close. But it had been much higher in this station. And that's why we said it's worse since October. They had dropped a few points, really.

The staff conclusions then are covered. And we did make [247] note that the timeliness had improved in COIN CP-6, particularly when we compared it against six and 12 months ago.

The next sheet, 100-3, shows a review of the rating activity at the top. It shows the total number of rating cases reviewed by the stations, 1,635. We have a standard for a station this size of 1440 for a year, so they did review an adequate number of cases.

They found 16 substantive errors for a one percent error rate. The judgment deficiencies were only nine for a 0.6, and procedural discrepancies were 0.6, for 4 percent.

The rating activities, there were only—that's—That portion there is wrong. There's something wrong with that part of the report there. There was more than 47. I'll have to check on this to see why it's typed this way. 47. I think that's the ones that were pulled in by central office.

We looked at 47 of their cases in the control—Oh, yeah. Central office audit. We looked at 47, found one, for a 2.1 error rate, which was almost double what they'd found on the 1600. We also found one for 2.1 error rate, which is almost three and a half times what they found. That's not statistically significant on such a small sample size, though, 47. We want to have a larger number than that before we come to any conclusions.

Q. Right.

A. The next shows the authorization package. We, again, are looking for a sample size of 1,728. They did pull at least that many. They—They reviewed 1,082. They found 21 [248] errors for 1.2 percent error rate in substantive, and they found 38 in judgment. And that should be a 3.1 percent error rate there.

Q. What does it say?

A. 2. That should be a 3. You can see it's—Somebody just made a—

Q. Typographical mistake?

A. Yeah, typographical mistake. Obviously, 38 out of the sample has to be somewhat higher than 21. Then procedural errors is 73 for a 4.1 percent error rate.

Now, in this case, authorization did look at a fairly good sampling of their authorization activity. They looked at 170, or roughly, 10 percent. They found 2 substantive, which is virtually the same percentage the station found.

Then in the judgment error, though, they found 9, which is—on that size of cases, that's a little—I would be concerned if that continued, say, in two or three in a row, because they're not only close to being out of control for the reported quality, it is two and a half times their reported error rate.

And then in the last category, we found 5, for a 2.9 percent error rate which validates their error found.

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[254] Q. Do you think the $10 is an adequate amount for [255] representation in death and disability compensation claims?

A. Well, as far as being adequate, you know, when you think about recompense on the basis of professional attorney, no. Obviously, an attorney—It's worth $10 to a practicing attorney, if they have any practice at all, just to write a letter.

Q. You wouldn't handle one for $10 if you were in private practice, would you?

A. No.

Q. You certainly couldn't afford to handle very many?

A. That's right. You'd have to have some other practice to keep the rent paid.

Q. You'd basically have to do it on a pro bono basis?

A. Pro bono. Right.

Q. And have you ever questioned in your own mind the fairness of the fee limitation?

A. Oh, I think I've thought about it, but, as far as seriously questioned it, I accepted it as a policy decision of years ago, and I've accepted it.

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[257] [A.] I guess that's my main reason.

Q. Well, at the Compensation and Pension Service, you receive periodically complaints about the fee limitation. In fact, you've received quite a number over the years, haven't you?

A. Yes, yes.

[258] Q. And a lot of them detailed in length, in letters, the reasons why they think the fee limitation is unfair and demand an explanation for it?

A. I've had some, yes. I've seen some.

Q. And a lot of the letters get very emotional, don't they?

A. Some do, yes.

Q. And you've noticed in your position that there's been a lot of criticism directed at the VA because of the fee limitation and the VA's position on changing the fee limitation, haven't you?

A. Yeah. Well, I don't know whether there's a lot. I know there's been some, yes.

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[259] Q. Well, the service officers generally don't have legal training?

A. That's true, but in our arena, we're working with—in a non-adversary relationship, they develop not necessarily an empathy, but they develop a working relationship with the rating boards and with authorization that, in my experience, has been very strong.

And even though we will disagree on cases, we can do it without becoming disagreeable. And I have always felt that I've had friends as far as, you know, people over in the service organizations.

Q. And I take it from your answer that young attorneys could develop that some rapport?

A. Oh, I think they could, but I think you're talking about adding in some costs, some delay. I'm saying that when you come to a table with attorneys, generally, you'll have one attorney that's going to raise some questions about evidenciary matter, procedural—Generally it's going to be a procedural question about how we're going to—And I've seen some pretty rough, you know, little naughty things, procedural, and some rating considerations worked

out in hearings with the claimant right there and the service [260] officer sitting there at that table.

* * * * *

Q. Well, you'll agree with me right now there are very few attorneys who specialize in veterans work?

A. Yes, I agree with that.

Q. Very few attorneys involved in the process at all?

[261] A. That's true.

Q. And because of the fee limitation, attorneys haven't developed a specialty in veterans work, correct?

A. That's—That's probably—

Q. And most attorneys are not familiar with the rules and regulations and circulars, and so on, of the Veterans Administration?

A. Well, they're probably familiar with Title 38 because they know the U.S. Code, you know, as a general matter.

Q. And most of the attorneys who do get involved in the process usually do it on a one-time only basis, or a good percentage of them?

A. Probably a high percentage of them. That's true.

Q. And most of the attorneys who do get involved do it as a favor to a friend or a relative, or because of some other client relationship—attorney/client relationship with that particular client on another matter; isn't that right?

A. Yes, but there is some pro bono. I've known a couple of attorneys in Tampa that will do it really just as part of the—because they're a veteran themselves and they see a particular case—

Q. They do it, but they don't do it full time, do they?

A. Oh, no, no.

Q. They do an occasional case on a pro bono basis?

A. That's true.

* * * * *

[262] Q. If you don't remember, that's okay. You don't know the names of any attorneys, private attorneys, that do veterans work on a full-time basis?

A. No, I do not.

Q. You've never met one?

A. That's correct.

* * * * *

[263] [A.] So yes, I've probably been involved in many with attorneys at that level. But it's a little different than what we're talking about right now. School liability is, first of all, they're getting paid, or they're from the State Attorney's office. So these are private attorneys representing the school, and it's not pro bono. So that's different, too.

Q. How is it different? They spend more time on the case when they're getting paid?

A. You betcha. They spend a lot of time.

Q. And they cause a lot of more trouble for the VA?

A. Well, they do a very detailed review, and they certainly don't facilitate the review of a group of cases. It can be very tedious and time consuming.

Q. And is that your main objection that you would have of removal of the fee limitation, that it would cause more time in terms of attorneys would do a better job and cause more administrative time in handling claims?

A. Well—

* * * * *

MR. ERSPAMER: I'll rephrase the question.

Q. Is your main objection to having elimination of the attorneys' fee limitation the notion that it would increase administrative time?

[264] Oh, it's not my main objection. It would be one of the considerations.

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[265] Q. Well, you're not suggesting that if the fee limitation were removed, that service organization would have no role anymore, are you?

A. I—I'm not suggesting we have any role, but I think they would have a diminished role.

Q. And do you think the claimants would prefer to have an attorney represent them rather than a service organization, given the choice?

A. Well, I guess I'm making a further assumption that may not necessarily come to pass, but if you had—I've seen attorneys, for example, that do advertise in newspapers where they say they can represent people before the Social Security on appeals. I would say this would probably hap-

pen with law firms if they—if the fee limitation was removed.

Q. And you think people would choose attorneys over the service representatives?

A. I think some would. I don't know what percentage would be.

Q. But enough so that it would interfere with the idyllic world you see that exists right now?

A. Well, when you say it like that, it's pretty—It's pretty good compared to what it would be under adverse conditions.

Q. You're not suggesting that if the fee limitation were removed, that claimants couldn't choose service representation to represent them in front of the VA?

A. No. I'm—I wasn't contemplating a cutting off of [266] representative by service organizations.

Q. And so if the claimants, in fact, agree with you that the situation is working nicely now the way it is, the vast majority of them, then you wouldn't expect very many of them to hire attorneys, would you?

A. Shouldn't be too many, but again, we haven't really defined how this attorney fee is going to be paid, whether it's going to be paid on top of the payments or it's going to be taken out of the—out of the benefit itself.

Q. Well, in fact, the incentive on the part of the claimant would be to—all other things being equal, to take the service representative over the attorney because he'd have to pay the attorney. He doesn't have to pay the service representative, right?

A. Possibly. It would depend on what—you know, what kind of benefit he's got, what claim he's got and what he's looking for.

Q. And in that situation, with the—you'd only expect him to choose the attorney if he thought the attorney could do a much better job for him than the service representative, wouldn't you, but it's costing him for the attorney and it's not costing him for the service representative?

A. Well, there's a thought along those lines that you get what you pay for.

Q. And how much do service representatives cost now?

A. They really—They really don't cost anything out of pocket. The person gets—They would expect a certain percentage of these people to become members of the [267] organization. But I don't think anybody out there right now—there's probably some rare exceptions—are twisting anybody's arms to make them join the organization just because they obtain the benefit.

Q. What about the delivery of services by service representatives in rural areas? Don't you perceive that as being a problem?

A. I see that as being a problem just that those people have trouble just getting to the store and doing—I come from an area where we have lots of people that don't even—They can't even afford a car or they can't even have driver's license any more.

* * * * *

Q. You expect attorneys to take—if they were being compensated, to take a much more active role, day-to-day role, in the claim than the service representatives do?

A. Well, that's true, but I wouldn't expect them to start making housecalls like doctors used to do.

* * * * *

[268] Q. Have you ever received criticism or heard criticism of the fee limitation from members of your own staff or people that work with you in the Veterans Administration?

A. Not really criticism, no, not really.

Q. Well, have you heard any criticism? What about mild criticism?

A. Oh, sure.

Q. And who have you heard mild criticism from?

A. Once in awhile when you're out in the field, you talk with staff members, you'll have somebody come up in staff at the hospital or maybe one of the county service officers will come up and say, "Certain types of cases, it might be nice to have, you know, an attorney that's well trained in a particular area with—also with some medical background, [269] too."

* * * * *

[270] Q. And who, in your—in the Compensation and Pension Service is in charge of responding to complaints that come in through the mail or complaints from Congress with regard to fee limitation?

A. That would—That would be Gary Hickman.

Q. And he signed your name to a lot of these letters responding to claimants?

A. Yes. There might be a few of those also going through Bob Polcari's shop, too.

Q. Are the letters routed across your desk or are they just handled without your knowledge?

A. That type of a letter probably, if it has a special interest, would not come to my desk.

Q. Here's one, for example, from a John D. Leigh in Saratoga Springs, New York.

> "Dear sir, May God bless the Administration. Your contempt for the plight of atomic veterans by intentionally using the same guidelines thrown out of Federal court, shows once again your good faith."

Do you recall seeing a letter such as that?

A. Possibly one or two like that, yes.

Q. And from Mr. E. Moller:

> "Dear sir, in an action exhibiting [271] callous, contempt for the plight of atomic veterans, the VA has published as, quote, 'New Guidelines for Atomic Veterans Claims' the same guidelines that were earlier thrown out by a Federal court. I demand that the VA promulgate guidelines in good faith and that a stop be put to this bureaucratic runaround."

* * * * *

MR. ERSPAMER: Q. Does that sound unusual to you?

A. I don't see many letters like that. Of course, the letters you're looking at, as I say, probably would not come to my desk on a regular basis. I'm not surprised that there are some complaints like that.

* * * * *

[273] MR. ERSPAMER: Q. So you don't see any fairness in a situation which I'll describe to you, a situation where, as a hypothetical question, I'm going to pose: Two servicemen are standing on the deck of the USS FULTON

during Operation Crossroads and they're both exposed to radiation from the blast. And one goes to St. Petersburg, let's say, and one goes to San Francisco.

And they both come down with the identical disease, leukemia, the same year in separate places, and they both file claims and the St. Petersburg claimant does a wonderful job and he wins, and the claimant in San Francisco does [274] nothing and he loses. You don't see any basic unfairness there?

A. Well, I see a couple of problems, evidenciary problems, mainly. As far as trying to set up a precedent file, and say, this is what happened if everybody that was on APA or AKA 47, and the ones that were exposed fell over, let's say, in a lifeboat, and they were exposed to the water.

There are so many things that happen in this period of time, let's say, roughly 30 years. Even though it might be the same type of leukemia, they are probably—one has been working in an industrial situation, working, where he has perhaps been exposed to other types of radiation. The other one has been in a virtually clean atmosphere.

I just see so many other variables that would be involved in these cases. That's why I think it would be—you'd be very hardpressed to come up with a case and say, "Okay. Everybody on AKA That comes up with leukemia or a certain type of lung cancer is going to be service connected."

Q. Okay. That answers half of my question, I think. But what about the question of whether or not the St. Petersburg office and the San Francisco office ought to be communicating with each other and saying, "Look, we've got—we've got people that were standing side by side," and find out that they have people standing side by side on the same ship or suffering from the same disease, and whether some mechanism ought to be in place for communicating that to the adjudication divisions so they can take into account the [275] existence of other similar claims to the one being adjudicated?

A. Of course, to an extent that's what some of the studies are trying to do. For example, in the Agent Orange, the ranch hand things, things like that. We are trying to estab-

lish commonality. And where it is appropriate, I think we can begin to do that.

But we're talking about exposure now that occurred more than 20 years ago. Some of this was almost 40 years. And at what point—You know, at what point would we begin to say, "How could this be connected?" Say, remember in 19—the test—1946, 1948, is close to 35 years. It is roughly 35 years ago.

And they're getting into a range now where certain types of cancer—It's very remote that they could be connected with that type of exposure.

Q. They're finding, for instance, a large incidence of multiple myeloma in the last five years among survivors of Hiroshima, Nagasaki, are they not?

A. I wasn't aware that they had large numbers. I knew there was a few. I'm not familiar with that part of the study. I'd have to confer to Dr. Smith as far as—

Q. Well, different cancers have different latency periods?

A. That's true.

Q. Some have a latency period of 5 to 15 years, some have latency periods of 20 years or more, correct?

A. Yes, but very few have 40-plus years. That's where you're getting beyond the normal range.

[276] Q. Well, we haven't had a 40-year sampling period for the atomic bomb, have we? The first atomic bomb was dropped in 1945?

A. Right.

Q. And there won't be a 40-year sampling period until 1985?

A. Right.

Q. So we really haven't had the experience to determine whether there's a 40-year latency period with regard to atomic bomb tests?

A. We really don't have an agreement on the real experts, as far as I know. I've talked—What I've learned from talking with doctors, on even the 30-year on some of the types of cancers. And as you pointed out, the types of radiation that was the received, whether it was traumatized—

Q. If I'm reading your answers correctly, you're saying that even given the reasonable doubt standard and the fact that the VA is supposed to give the claimant the benefit of a doubt, you see almost insurmountable barriers to most of these atomic radiation cases?

A. I think we've got to have—Again, going back to—I won't call it a consensus, but you've got to have some approach—not unanimity, but certainly more than what we have for most of these before we can begin to have a scientific basis upon which to make compensation.

Q. Well, are you aware of the report by Dr. Glen Caldwell from Project Smokey which found the incidence of leukemia and polycythemia vera that was many times higher than could be [277] expected from the general population with regard to the participants in Project Smokey?

A. Yes. I have discussed that very briefly with Dr. Smith. I did not have that discussion until just this week with Dr. Smith. Remember, we didn't know about that until just recently. It wasn't anything that was—

Q. I believe that report was issued in January of 1982, I believe. Are you aware of any current study with regard to atomic veterans similar to that that is being prepared with regard to the Agent Orange people; in other words, a medical follow up study?

A. Well, we have several studies, you know, going on at different—in different countries and at different levels as far as Agent Orange is concerned.

Q. I'm asking about atomic radiation.

A. Oh, I'm sorry. Could you repeat that question?

Q. I'll ask it again. Are you aware of any follow-up studies being done concerning the population of veterans who were exposed to atomic radiation during the atomic bomb testing program?

A. I've discussed this again with Dr. Smith about where we're at, but as far as having a—a study like we're conducting for Agent Orange or preparing for like CDC has, no, I'm not aware of one of that magnitude. I know there's some individual studies going on, state universities and municipalities.

* * * * *

[279] [Q.] Now, the VA has the power under the 38 USC to issue supboenas to obtain documents in support of claims, does it not, under 3511?

A. Yes.

Q. And what was the incidence of the issuance of such supboenas in your experience in the St. Petersburg office? Are you aware of any?

A. I'm not aware of any.

* * * * *

[280] Q. Well, for example, in the notice of hearing rights that is given to claimants upon a notice of decision denying their claim, service representatives are mentioned more prominently than attorneys, are they not?

A. You mean in that they're listed first or—

Q. Well, they're listed first and they're highlighted?

A. I wasn't aware of the highlighting. It's possible—I'm quite sure they're listed first, but the highlighting, I was not aware of that.

Q. For instance, reading from Exhibit K to the Complaint:

> "Notice of Procedural and Appellate Rights representation. You may be represented without charge by an accredited representative of veterans organization or other service organization recognized by the Administrator of Veterans Affairs."

So it's first, right?

A. Right.

Q.

> "Or you may employ an attorney to assist you in your claim. Typical examples of counsel who may be available include attorneys in private practice or Legal Aid Services. The services of a [281] recognized attorney are subject to a maximum fee limitation of $10."

And so on. You don't see any bias in that statement in favor of service representatives as opposed to attorneys?

A. As you said, they're listed first.

Q. They're listed first and attorneys are discussed in the context of a fee limitation. Don't you think the combined effect of those is to encourage a claimant to designate a service representative?

A. I guess in a lot of cases, it would, yes.

* * * * *

[284] Q. And this is a letter directed to a Mr. Robert T. Dunbrow, an attorney in Fresno. I want to direct your attention to the fourth paragraph where it says, "Your attention is invited to particular," and I think they probably mean "in particular," "to section 14.634."

That's the fee limitation, is it not?

A. Yes.

Q. That's 38 CFR?

A. Yes, I think it is.

Q. And you'd agree with me, would you not, that an attorney reading this letter would probably be drawn to read 14.634?

A. Yes.

Q. And upon reading it, he would find that his fees were limited to $10?

A. That's true.

Q. And what is the next step that you would expect the attorney to do, assuming he'd not known of the fee limitation previously?

A. Well, he would consider, first of all, whether he wanted to represent this on a pro bono basis, and secondly, probably, unless he happened to be in a pretty good financial state of affairs, might decline.

Q. He might withdraw from the representation?

A. That's right.

* * * * *

[285] Q. And do you find anything troublesome about the second paragraph of the letter where it says, "If we do not heare from you within 30 days, we'll assume you do not intend to complete your appeal, and our records will be closed"? And particularly to the form, "if we do not hear from you, we will assume"?

A. I guess the wording—I know what you're concerned about, are we going to cut this off administratively or take a record purpose disallowance without any further modification.

Q. Yes. That is my concern. And perhaps the claimant may be on vacation, a six-month vacation, to Tiajuana or

[286] somewhere, or even a 30-day vacation, and his claim will have been—at least according to his understanding, will have been closed by the time he gets back.

Do you see any problem with the—with the way that that's phrased?

A. I see—Yes. I could see a problem with it.

Q. And do you think this is a proper phraseology given the non-adversary nature of the VA process that you have testified to previously?

A. I'm trying to think of what might be involved in this particular case. We're doing a supplemental statement of the case. It could be that the writer of this particular letter thought they had such a clearcut issue that the supplemental case now—I believe the second step in this appellate process probably would have resolved any real question in the claimant's mind. That would be my only other suggestion to explain why it was worded, that second paragraph, that way.

This happens to be a pattern letter then, right?

Q. This is a pattern letter that was produced to us by Mr. Verrill from the local office out of his pattern letter book. In fact, the whole exhibit is a collection of pattern letters.

And if you look at 18-83, which is G 140—Maybe I can find it more quickly for you here.

A. Here. Just happened to turn to it.

Q. Okay. If you look down to the fifth paragraph where it states:

> "If we do not hear from you within [287] 30 days we must assume that you have no additional evidence to submit and you do not desire additional time for presentation of your case. A decision will then be made on the basis of evidence of record,"

that's a similar type of provision, is it not?

A. Yes, but there's one difference there. It does indicate that we are going to make a decision, and I would assume—I won't use use the word "assume," but we will notify he or she of that decision, that last sentence.

Q. But it's the same in the sense that if the claimant happens not to be—for instance, in the hospital or not home

and doesn't read his mail for 30 days, the improper asumption is going to be drawn by the VA based upon the statement that's contained in this form?

A. That's true. But again, I go back to our discussion yesterday. It's not like a default judgment. That person can still come back in and pick up the issue and go forward with it when they—when they do—

Q. But unfortunately, there's nothing in here that tells him that he has up to a year to pick up the ball and go forward with it, is there?

A. No. That's true.

Q. And there was nothing in the prior exhibit, either, that told him that he could pick up the ball after 30 days and still run with it, was there, on 8?

A. No, no.

* * * * *

[289] Q. And directing your attention to A 111, which is, again, near the Hearing Letter—No Rep, 18-11 and 18-12—

A. Right.

Q. If you could, direct your attention to page two starting with, "a number of organizations are available to represent you at the hearing at no cost to you," and it lists, I think, 12 of the service organizations—

A. We try to refrain from having stations do that very thing. Of course, as you pointed out, also—the private attorney is not mentioned at all.

Q. The private attorney is not mentioned at all. Do you see any problem with the fact that the private attorney is not mentioned at all?

A. As soon as you start itemizing a list like this, you're necessarily going to have a problem with private attorneys, or another group—There's at least two other groups I can think of that's not listed, either.

Q. Swords to Plowshares not listed, either?

A. That's right.

Q. And do you have any—Can you give us an idea of how [290] you would treat a review of this piece of pattern correspondence? Would you consider this to be a substantive error, procedural error or judgment error?

A. Probably judgment in this case. This one does bother me. The fact that we specified 12 organizations, we've left off—There's another one in California that's active out here. It's one of the newer organizations. Ex-POW is not listed. Yeah. It's a—

Q. And do you have any problem with the first page there, paragraph three, which reads:

> "There are a few common misconceptions regarding hearings. For example, appellants assume that the hearing is a necessary step in the appeal process. This is not true."

Let's start with this one. Do you have any problem with that?

A. Well, it's—Literally speaking, it's not absolutely true we have to have a hearing, but it is provided for and for the claimant, it should be avai' ble.

Q. And it is suggested there's some disadvantage in having a hearing?

(Brief interruption.)

MR. ERSPAMER: Could we have the question back.

(Record read.)

THE WITNESS: I can't agree with that completely, because when I read the three sentences, "There are a few common misconceptions regarding hearings. For example, [291] appellants assume that there is a necessary step involving the appeal process. This is not true."

Those three sentences by themselves are assuming, first of all, a fact that the appellant may or may not have in their mind. It's the thrust of the paragraph is what bothers me.

And it's actually a later sentence that bothers me more than that, is where they start talking about appellants assume—"Also, appellants assume that the hearing is conducted by persons at a higher administrative level than those who made the administrative decision. Actually, the hearing is conducted by persons in the same positions as those who made the decision."

I don't know why that was added in there, really, either. Those two sentences together, I think when you read the entire paragraph, that's probably what you're more concerned about.

Q. I was going to get to that. My first question is, at least that first sentence, the first two sentences, three sentences, at the very least, suggest there's no advantage in having a hearing?

A. Well, I'm not even sure I can agree with that completely. It's possible in a lot of them—Yes. In a lot of readers' mind, that might be true.

Q. In a lot of claimants' minds?

A. Yes.

Q. And getting to the—the sentences which you referred to, wouldn't you agree that the last two sentences are apt to [292] induce the reader into believing that the appeal would be decided by the people who made the original decision because they're the people who would be hearing the hearing?

A. Well, I think that sentence is designed ' cover the eventuality that some of those people may not be there because of leave problems. Maybe they're in a leave period and that they would use another rating specialist to be on the hearing.

But I look at the letter maybe from a different point of view. We have someone here that has already taken the effort to prepare themselves for a hearing, and right now, all we're trying to do is select a tentative date and place for that hearing, hearing room so and on, and I don't think you're going to discourage the appellant that wants to pursue their claim from showing up with this—this—these three, the first three sentences themselves. I don't think they're going to discourage a serious appellant.

Q. But it might discourage some appellants?

A. It might.

Q. And it's calculated, is it not, to discourage the appellants from exercising the right to a hearing?

A. Well, the whole paragraph, it's certainly not a very—The first two paragraphs go right along with, you know, getting this thing ready to go, and we're talking about what the hearing is going to be like and, you know, it's certainly not a, "May I help you" type paragraph.

Q. Well, then, especially when you look at the sentence, the second to the last sentence at the bottom of the page, "Of [293] course, you may decide at any point that your evidence can be presented equally well in writing," that, in conjunction with the previous sentence, certainly can't be read by you as encouraging a claimant to exercise his right to a hearing, correct?

A. I guess that could be viewed that way.

On the other hand, the figures, what we saw on here in VARMS, would indicate that, from an appellate review standpoint, is figures are pretty good. So apparently they're doing a pretty good job locally.

Q. And it also shows that there are very few appeals held locally?

A. I don't know how many hearings they did have locally. I'm not aware of the local numbers.

Q. Well, Verrill testified they have hearings in approximately five percent or less of the cases.

I'm going to read to you another sentence from another letter, which is Exhibit H to the Complaint, which is to Mr. Reason Warehime from Mr. Verrill, which is similar to the pattern letter, which is A 111. You don't have it in front of you but I'm going to read you the follow-up sentence at the bottom.

> "If you still wish to have a personal hearing, please advise us within 30 days and we'll be happy to schedule one for you. If we do not hear from you, we will assume you wish your appeal [294] to be certified to the Board of Veterans Appeals without further delay for a hearing."

Again, that puts the onus on a person who's already requested a hearing to again request a hearing within 30 days. Do you consider that that's proper? Do you want to look at it?

A. Yeah. Let me look at that for just a second.

Q. I was referring to the last paragraph of the letter.

A. I'm sure the local office in this case feels that they will still have an opportunity after it's certified to BVA. At that point, there will still be an opportunity to even with-

draw it if they want to, or have a hearing back here if the party would so desire.

And they're trying to keep it in—in line in the VARMS system so that it's not delayed. I think we're talking about maybe the mechanics of the VARMS here being disrupted maybe as much as the other part of the letter you don't like.

Because once you do take it out of this control here and put it back into another category, another code, you have delayed the appellate review.

Q. So you see nothing wrong with that bearing?

A. It's not a perfect letter, but I don't see any—

Q. But it's acceptable to you?

A. I don't see any—I don't see a substantive error, for example.

Q. So you don't see anything wrong—You don't see anything wrong with the VA adjudication officer trying to [295] coax a claimant into trying to waive a personal hearing?

A. Well, when I get back, we're going to study the pattern paragraphs. There's two in there you brought to my attention that cause me some problems. I will assure you that we'll do a review of pattern letters in the field, because we're not—we're not really trying to push people out the door and tell them, "We don't really want to see"—you know, "We'd rather go down and have a hamburger or something."

Q. And if you were trying to push people out the door, that certainly would not support your testimony earlier that the VA is a non-adversarial system, would it?

A. Well, we didn't write those type of letters where I came from. I mean, we did have a great number of hearings. I—I can't tell you what percentage it was.

Q. And do you have any objection to form correspondence? And I'll give you some examples if you want, in case of denials of claims that all start off with the—the first phrase, "We have carefully considered your claim for" whatever, and then going on to deny the claim? Do you have any problem with form correspondence that always says, "We have carefully considered your claim"?

A. Well, not from a substantive standpoint, but I think when they're always saying it, yes, that would bother me a little bit, if it's just a stereotype and begins to mean nothing to the writer. And of course, then, it might be perceived the same way by the reader.

* * * * *

EDITOR'S NOTE

PAGES 507 thru 627 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(896) (955)

A 111
Hearing Letter - No Rep
D

Dear D:

With respect to your request for a hearing, we have selected a tentative date and time of D. Hearings are conducted at this address on the 12th Floor, Hearing Room D. Personal expenses incidental to hearings must be met by appellants.

In a few days we will contact you to confirm the hearing date. In the meantime, you should consider several points regarding hearings. Our hearings are non-adversary. That means that they are informal and serve the purpose of receiving testimony pertinent to the issue. We do not contend with appellants by arguing our point of view, and we do not conduct cross-examinations. See the enclosed form for more information on the nature of hearings.

There are a few common misconceptions regarding hearings. For example, appellants assume that the hearing is a necessary step in the appeal process. This is not true. You may proceed with an appeal to the Board of Veterans Appeals, Washington, D. C., even though no hearing transpired. Also, appellants assume that the hearing is conducted by persons at a higher administrative level than those who made the original decision. Actually, the hearing is conducted by persons in the same positions as those who made the decision.

We offer these observations to enable you to make an informed decision on the question of proceeding with the hearing. We will be happy to assist you further when we contact you in a few days. Please take this time to consider the evidence you wish to present and whether a personal hearing is the best means of presenting it. Of course, you may decide at any point that your evidence can be presented equally well in writing. If you so decide, please use the enclosed statement(s) in support of claim.

343/21 D

Plfs Exhibit 2
Date 6/3/83
Wit I. Verrill
Carolyn M. Wilson, CSR 4913

A02905

507

(756)
(897)

2.

A number of organizations are available to represent you at the hearing at no cost to you. A service organization can assist you in all phases of your claim including preparation for a hearing. If you desire to be represented by a service organization, please complete, sign, and return the enclosed VA Form 23-22 to this office. We suggest that you choose one of the organizations listed below that maintains offices at this address:

American Legion
American Red Cross
AMVETS
Blinded Veterans Association
California Department of Veterans Affairs
Catholic War Veterans
Disabled American Veterans
Jewish War Veterans
Military Order of the Purple Heart
Paralyzed Veterans of America
Veterans of Foreign Wars
Veterans of World War I

There are other organizations available to assist you which are not located in this building. Information will be furnished upon request.

Sincerely yours,

T. A. VERRILL
Adjudication Officer

PLEASE BRING THIS LETTER WITH YOU TO INSURE ADMITTANCE TO THE 12th FLOOR.

Enclosures:
VA Form 21-4138

cc:
231C3
21H
RB

A02906

Nov. 1, 1982 ~~751~~ 899

AGENT ORANGE CLAIMS

		Number	Percent
A.	Total Number of Claims	15573	100.0%
	Claims with Diagnosis Confirmed	7815	50.2%
	Claims with Diagnosis not Confirmed	4133	26.5%
	Claims with No Disability Alleged	3625	23.3%
B.	Claims with Diagnosis Confirmed	7815	100.0%
	Allowed for Reason Other than Agent Orange	1164	14.9%
	Denied	6651[a]	85.1%

a. These 6651 claims having more than one claimed diagnosis fall into the following categories:

Skin condition (acne, alopecia, eczema, keloids and urticaria)	3892
Nervousness, headaches and fatigue (claimed)	2415
Paralysis or numbness and other symptoms of extremities	905
GI and GU conditions	787
Malignancies (leukemia, lymphoma, melanoma, Hodgkin's, etc.)	471
Impaired sexual activity (alleged)	359
EENT pathology	463
Lung condition	288
Cardiovascular and hypertension	243
Misc.	143

* Approximately 94% or 1096 of the total 1164 claims allowed are service connected for skin condition. Balance of 6% or 68 claims were allowed for cancer, psychiatric and neurological conditions and various other miscellaneous disabilities.

Plfs Exhibit 4
Date 6/3/83
Wit J. Verrill
Carolyn M. Wilson, CSR 4913

(750)

Veterans Administration

(900)

REFERENCE SLIP

TO (Name or title—Mail routing symbol)	INITIALS—DATE
1. Adjudication (21)	
2.	
3.	
4.	
5.	

REASON FOR REFERENCE

- ☐ AS REQUESTED
- ☐ COMMENTS
- ☐ CONCURRENCE
- ☐ FOR YOUR FILES
- ☐ INFORMATION
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ PER CONVERSATION
- ☐ SIGNATURE

REMARKS

SUBJ: New Adjudication Work-Rate Standards

Attached are the new work-rate standards. These standards will be effective with the October 1981 operating performance reports.

M21-4, App. C will be updated in the near future.

FROM	DATE
MAX R. WOODALL, Director Compensation and Pension Service	11-6-81 TEL. EXT. 3293

VA FORM MAY 1980 3230 EXISTING STOCKS OF VA FORM 3230, AUG 1976, WILL BE USED.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1981 — 724-939

Plfs Exh 9
Date 6/6/83
Wit T. Verrill
Carolyn M. Wilson, CSR 4913

TO BE EFFECTIVE 10 - 1 - 81
EXCEPT MANILA

(901) (759)

END PRODUCT	TOTAL	RATING	AUTHORIZATION	INPUT	FILES
110 initial comp.	2.84	1.27	1.27	0.04	0.26
180 initial certain	2.48	0.84	1.34	0.04	0.26
120 review reopen	2.58	1.04	1.24	0.04	0.26
140 initial death(SC)	2.38	0.75	1.33	0.04	0.26
190 initial " (NSC)	1.55	----	1.25	0.04	0.26
170 N.O.D.	3.03	1.38	1.37	0.02	0.26
130 Dependency Issue	1.19	----	0.89	0.04	0.26
150 Income issue NSC	1.18	----	0.88	0.04	0.26
160 Burial benefit	1.21	0.01	0.90	0.04	0.26
210 Vac. Rehab.	1.04	0.01	0.79	0.03	0.21
220 General Education	0.77	----	0.53	0.03	0.21
230 Special Education	1.53	----	1.32	----	0.21
250 " "	2.15	0.40	1.51	0.03	0.21
290 Eligibility Determination	1.04	0.08	0.68	0.02	0.26
310 Examination Review	1.07	0.26	0.53	0.02	0.26
320 Hospital Review	1.21	0.36	0.57	0.02	0.26
* 330 No Action	----	----	----	----	----
* 400 Correspondence	----	----	----	----	----
500 Congressional	1.46	----	1.26	----	0.16
680 Special VALO Review	1.80	1.15	0.51	0.02	0.12
690 " " "	0.57	----	0.43	0.02	0.12

MANILA ONLY

END PRODUCT	TOTAL	RATING	AUTHORIZATION	INPUT	FILES
110	2.59	0.87	1.31	0.15	0.26
180	3.04	0.84	1.79	0.15	0.26
120	2.47	0.71	1.35	0.15	0.26
140	2.87	0.75	1.72	0.14	0.26
190	2.04	----	1.65	0.13	0.26
170	2.58	0.94	1.36	0.02	0.26
130	1.28	----	0.88	0.14	0.26
150	1.28	----	0.88	0.14	0.26
160	1.43	0.01	1.01	0.15	0.26
210	1.02	0.01	0.78	0.02	0.21
220	0.77	----	0.52	0.04	0.21
230	1.52	----	1.31	----	0.21
250	2.17	0.40	1.47	0.09	0.21
290	1.21	0.08	0.77	0.10	0.26
310	1.16	0.26	0.53	0.11	0.26
320	1.30	0.36	0.57	0.11	0.26
* 330	----	----	----	----	----
* 400	----	----	----	----	----
500	1.45	----	1.25	----	0.16
680	1.80	1.15	0.51	0.02	0.12
690	.57	----	0.43	0.02	0.12

NOTE: For Adjudication Divisions with Centralized Transcription Units, the work-rate standard for "Minutes Transcribed" and "Forms and Form Letters Typed" is .038 for Manila and .081 for the other stations with CTU's in the Adjudication Division.

The work-rate standard for EP 330 is .19 and for EP 400 is .22. These times are not shown in the above charts since they have been spread across applicable end products.

(902) (983)

APR 20 1981

Section Chiefs

Although VAR 110 permits a hearing anytime on any issue, we do not have the resources to operate in this way. Hearings should follow the Statement of the Case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. We can always explain why a hearing is not appropriate at a particular stage in processing. In cases previously disallowed the hearing process must be discouraged as a means of presenting new and material evidence. Personal history can

17-B

(984)
(903)

be presented on VAF 21-4138 or affidavits. Recitation of facts already of record or new facts not tying the issue to service, i.e. a description of present symptoms, will not help the case. I know you are aware of these points but the appellant isn't.

To effect this change in policy, employees will obtain the initials of a Section Chief on all requests to RI to schedule a hearing.

T. A. VERRILL
ADJ. O/C

17-138

485
964

VETERANS ADMINISTRATION
CENTER
WISSAHICKON AVE. AND MANHEIM ST.
P.O. BOX 8079
PHILADELPHIA, PA. 19101

Date: SEP 14 1977

In Reply Refer to: SS 210-22-8460
310-21

SUPERVISORS & SR. ADJS. & RTG. BD. CHAIRME.

Mr. Elmer H. Reinaker
RR4, Box 250
Danville, PA 17821

We have just received more medical reports from Bloomsburg Hospital. These records together with the records from Geisinger Medical Center cover many years from 1948 to the present. These records will be evaluated in the near future to determine whether service connection may be granted. You should hear from us in the near future.

Your request for a hearing will be considered at a later date. We do not normally grant hearings before the original decision is made. If the decision is not favorable to you, you will then have an opportunity to file a Notice of Disagreement and initiate an appeal. Hearings are offered as part of the ~~field~~ appellate process.

We sincerely regret the delay in handling your claim and will make every effort to expedite our decision.

T. A. VERRILL
Adjudication Officer

cc:
DAV

SAMPLE & REMINDER

"To care for him who shall have borne the battle, and for his widow, and his orphan." – ABRAHAM LINCOLN

17-13c

Mar. 1, 1983 ~~337~~ 905

RADIATION EXPOSURE CLAIMS
DISPOSITION AT REGIONAL OFFICES

		Number	Percent
A.	Total Number of Cases in Study	3325	100.0%
	Cases with Diagnosis	2321	69.8%
	Cases, no Diagnosis	1004	30.2%
B.	Cases with Diagnosis	2321	100.0%
	Allowed	69	3.0%
	Denied	2252	97.0%
C.	Total Cases in Study	3325	100.0%
	Claimed A-Test	2067	62.2%
	Claimed Other Exposure	1258	37.8%
D.	Those Who Claimed A-Test	2067	100.0%
	Allowed	14	.7%
	Denied	1466*	71.0%
	No Diagnosis	587	28.3%
E.	Those Who Claimed Other Exposure	1258**	100.0%
	Allowed	55	4.4%
	Denied	760	60.4%
	No Diagnosis	443	35.2%

IN SUMMARY

Total Cases	3325	100.0%
Allowed	69	2.1%
Denied	2226	66.9%
No Diagnosis	1030	31.0%

* These 1466 claims have the following 813 malignant diagnoses:

Histiocytic leukemia - 2	Blood condition - 3	Endocrine cancer - 26
Myelocytic leukemia - 28	Lymphocytic lymphoma - 24	Skin cancer - 114
Hairy cell leukemia - 7	Hodgkin's disease - 14	Brain tumor - 35
Unspecified leukemia - 30	Respiratory cancer - 215	Melanoma - 16
Lymphocytic leukemia - 18	G. U. Cancer - 106	Cancer, musculo-skeletal - 26
Myelogenous leukemia - 19	G. I. Cancer - 130	

** These 1258 claims contain 388 Nagasaki and Hiroshima claims consisting of leukemia and other malignancies 196 ; Misc. 135 and exposure only 57 . None allowed.

PH's Ex No. 46 (Standefer) Depo

(1038) 906

BOARD OF VETERANS APPEALS
RADIATION CASES

October 22, 1981

In the quarter ending September 30, 1981, the BVA received 46 new appeals involving radiation exposure. Of these, 33 were bomb related and 13 were for other types of radiation.

A recapitulation of radiation exposure cases handled by the Board since early 1978 -- through September 30, 1981:

Category	Allowed	Benefits Granted By AOJ	Denied	Withdrawn	In Remand Status	Active at BVA	Total
Bomb-Live	26	3	199	12	22	28	290
Bomb-Death	12	2	78	-	22	15	129
Non/Bomb-Live	37	4	125	4	13	16	199
Non/Bomb-Death	10	3	36	-	5	8	62
Totals	85	12	438	16	62	67	680

The results of final determinations:

	Total	Allowed 1/		Denied		Withdrawn	
Bomb-Live	240	29	(12.1%)	199	(82.9%)	12	(5.0%)
Bomb-Death	92	14	(15.2%)	78	(84.8%)	-	
Non/Bomb-Live	170	41	(24.1%)	125	(73.5%)	4	(2.4%)
Non/Bomb-Death	49	13	(26.5%)	36	(73.5%)	-	
Totals	551	97	(17.6%)	438	(79.5%)	16	(2.9%)

1/ Includes benefits granted by AOJ while appeal was in remand status.

Plf's Ex. No. 47
(Standefer Depo)

BOARD OF VETERANS APPEALS
Disposition of Appeals Involving Radiation (Bomb)
First Quarter, Fiscal Year 1983

March 23, 1983

	BVA Decisions					Other Dispositions	
Category of Issue	Total	Allowed	Remanded	Denied	Other	Benefits Granted	Letter Reconsiderations
Character of Discharge	0	0	0	0	0	0	0
Disability Compensation	21	0	4.8%	95.2%	0	0	0
Disability Pension	0	0	0	0	0	0	0
Death Compensation	9	0	33.3%	66.7%	0	0	0
Death Pension	0	0	0	0	0	0	0
Forfeiture	0	0	0	0	0	0	0
Hospital/Outpatient Treatment	0	0	0	0	0	0	0
Insurance	0	0	0	0	0	0	0
Loan Guaranty	0	0	0	0	0	0	0
Vocational Rehabilitation and Education	0	0	0	0	0	0	0
Survivors and Dependents Educational Assistance	0	0	0	0	0	0	0
Waiver	0	0	0	0	0	0	0
Miscellaneous	0	0	0	0	0	0	0
Reconsiderations	0	0	0	0	0	0	0
AGGREGATE - Rad (Bomb)	30	0	13.3%	86.7%	0	0	0

Plf's Ex. No. 48
(Standefer)

BOARD OF VETERANS APPEALS
Disposition of Appeals Involving Radiation (Bomb)
Fiscal Year 1982

March 18, 1983

Category of Issue	BVA Decisions Total	Allowed	Remanded	Denied	Other	Other Dispositions Benefits Granted	Letter Reconsiderations
Character of Discharge	0	0	0	0	0	0	0
Disability Compensation	106	12.3%	11.3%	75.5%	0.9%	0	0
Disability Pension	0	0	0	0	0	0	0
Death Compensation	46	4.3%	26.1%	69.6%	0	1	0
Death Pension	0	0	0	0	0	0	0
Forfeiture	0	0	0	0	0	0	0
Hospital/Outpatient Treatment	0	0	0	0	0	0	0
Insurance	0	0	0	0	0	0	0
Loan Guaranty	0	0	0	0	0	0	0
Vocational Rehabilitation and Education	0	0	0	0	0	0	0
Survivors and Dependents Educational Assistance	0	0	0	0	0	0	0
Waiver	0	0	0	0	0	0	0
Miscellaneous	0	0	0	0	0	0	0
Reconsiderations	7	0	0	100.0%	0	0	0
AGGREGATE - Rad (Bomb)	159	9.4%	15.1%	74.8%	0.6%	1 (4.2%)	0
AGGREGATE - All Vets	35,771	13.0%	15.2%	71.0%	0.8%	1,194 (22.0%)	100

Plf's Ex No. 49 (Standefer Depo) BVA Dispo-Rad-Bomb J5

BOARD OF VETERANS APPEALS
Disposition of Appeals Involving Agent Orange
Fiscal Year 1982

March 18, 1983

Category of Issue	Total	BVA Decisions				Other Dispositions	
		Allowed	Remanded	Denied	Other	Benefits Granted	Letter Reconsiderations
Character of Discharge	0	0	0	0	0	0	0
Disability Compensation	566	11.0%	19.4%	69.1%	0.5%	10	0
Disability Pension	1	0	0	100.0%	0	0	0
Death Compensation	47	6.4%	29.8%	63.8%	0	0	0
Death Pension	0	0	0	0	0	0	0
Forfeiture	0	0	0	0	0	0	0
Hospital/Outpatient Treatment	0	0	0	0	0	0	0
Insurance	0	0	0	0	0	0	0
Loan Guaranty	0	0	0	0	0	0	0
Vocational Rehabilitation and Education	0	0	0	0	0	0	0
Survivors and Dependents Educational Assistance	0	0	0	0	0	0	0
Waiver	0	0	0	0	0	0	0
Miscellaneous	1	100.0%	0	0	0	0	0
Reconsiderations	1	0	100.0%	0	0	0	0
AGGREGATE - Agent Orange	616	10.7%	20.3%	68.5%	0.5%	10 (8.0%)	0
AGGREGATE - All Vets	35,771	13.0%	15.2%	71.0%	0.8%	1,194 (22.0%)	100

BVA Dispo-Agent Orange J5

A0U365

Plf's Ex No. 56
(Standefer Depo)

March 1, 1983

AGENT ORANGE CLAIMS

		Number	Percent
A.	Total Number of Claims	16821	100.0%
	Claims with Diagnosis Confirmed	8341	49.6%
	Claims with Diagnosis not Confirmed	4456	26.5%
	Claims with No Disability Alleged	4024	23.9%
B.	Claims with Diagnosis Confirmed	8341	100.0%
	Allowed for Reason Other than Agent Orange	1300*	15.6%
	Denied	7041[a]	84.4%

a. These 7041 claims having more than one claimed diagnosis fall into the following categories:

Skin condition (acne, alopecia, eczema, keloids and urticaria)	4303
Nervousness, headaches and fatigue (claimed)	2453
Paralysis or numbness and other symptoms of extremities	911
GI and GU conditions	796
Malignancies (leukemia, lymphoma, melanoma, Hodgkin's, etc.)	508
Impaired sexual activity (alleged)	360
EENT pathology	466
Lung condition	293
Cardiovascular and hypertension	252
Misc.	146

* Approximately 94 or 1225 of the total 1300 claims allowed are service connected for skin condition. Balance of 6% or 68 claims were allowed for cancer, psychiatric and neurological conditions and various other miscellaneous disabilities.

PH's Ex No. 57
(Standefer Depo.)

A01963

1043
911

HERBICIDE EXPOSURE CLAIMS

June 2, 1980

	Number	Percent
A. Total Number of Cases in Study	2341	100.0%
Claims With Diagnosis or Specific Allegation	1898	81.1%
Claims With No Diagnosis	443	18.9%
B. Claims With Diagnosis or Specific Allegation	1898	100.0%
Allowed	3[a]	.2%
Allowed for other reason	19[b]	1.0%
Denied	1876[c]	98.8%

IN SUMMARY

Total Claims	2341	100.0%
Allowed	22	1.0%
Denied	1876	80.1%
No diagnosis	443	18.9%

a. Claims for skin condition.

b. 16 claims skin condition, 3 claims for cancer

c. These 1876 claims having more than one claimed diagnosis or specific allegation fall into the following categories:

Skin condition (acne, alopecia, eczema, keloids and urticaria)	1045
Nervousness, headaches and fatigue (claimed)	605
Paralysis or numbness and other symptoms of extremities	321
GI and GU conditions	234
Malignancies (leukemia, lymphoma, melanoma, etc.)	182
Impaired sexual activity (alleged)	163
ENT pathology	126
Lung condition	110
Cardiovascular and hypertension	72
Misc.	67

Pltf's Exhibit No. 58
(Standefer Depo)

APPEALS STATISTICAL DATA - BOARD OF VETERANS APPEALS

	FY '70	FY '71	FY '72	FY '73	FY '74	FY '75	FY '76	FY '77	FY '78	FY '79	FY '80	FY '81	FY '82	3/28/83 1 Qtr. FY '83
FIELD WORKLOAD DATA														
Appeals Filed (NOD's)....	42,898	49,311	54,189	50,381	43,205	45,663	53,073	62,176	66,464	61,097	63,700	68,183	68,558	17,729
Dispositions.....	44,450	51,668	57,985	57,605	49,692	48,489	56,657	69,242	64,841	59,040	59,868	64,077	64,225	16,578
% Allowed.....	17.8%	17.1%	17.0%	17.0%	16.4%	14.8%	15.9%	14.3%	15.8%	16.1%	15.3%	15.0%	13.1%	12.7%
% Closed.....	25.3%	27.9%	27.1%	26.6%	25.3%	24.3%	23.8%	26.1%	19.7%	16.4%	23.6%	19.7%	24.2%	15.5%
% Withdrawn(and other).	5.6%	5.8%	5.3%	6.1%	6.5%	7.2%	7.4%	6.6%	8.0%	9.8%	10.6%	11.7%	10.9%	16.4%
% Certified to BVA.....	51.3%	49.2%	50.6%	50.3%	51.7%	53.7%	52.9%	53.0%	56.5%	57.7%	50.5%	54.1%	51.7%	55.4%
Pending - End of Period..	18,862	20,694	22,129	20,933	19,619	22,830	24,913	25,792	33,625	33,632	43,525	46,406	47,661	47,890
BVA WORKLOAD DATA														
Receipts.....	22,779	25,445	29,326	28,987	25,714	26,022	29,945	36,721	36,655	34,124	30,206	34,686	38,849	10,167
Dispositions.....	20,809	25,201	29,692	29,825	26,209	25,027	28,482	33,296	35,634	34,972	34,030	33,461	35,771	9,285
% Allowed.....	13.7%	11.8%	12.6%	13.9%	14.0%	14.8%	12.7%	12.7%	12.5%	12.7%	12.4%	12.4%	13.0%	14.0%
% Remanded.....	14.3%	14.3%	14.6%	16.5%	16.0%	15.9%	16.7%	15.6%	13.4%	13.6%	14.4%	14.3%	15.2%	14.7%
% Withdrawn(and other).	1.2%	1.1%	0.9%	0.9%	1.0%	1.7%	0.6%	0.5%	0.5%	0.6%	0.8%	0.7%	0.8%	0.9%
% Denied.....	70.8%	72.8%	71.9%	68.7%	69.0%	67.6%	70.0%	71.2%	73.6%	73.1%	72.4%	72.6%	71.0%	70.4%
Pending - End of Period..	5,353	5,597	5,231	4,393	3,898	4,893	6,544	11,470	12,491	11,636	7,812	9,037	12,115	13,037
IME Requests.....	199	136	183	224	161	168	150	129	131	182	147	117	153	44
AFIP Requests.....	60	63	69	74	77	77	87	43	70	43	64	67	49	15
CMD Requests.....	205	138	115	124	119	117	105	129	97	60	74	70	83	24
Reconsiderations.....	224	146	156	219	144	199	197	225	334	294		202	250	53
% Allowed.....	22.3%	24.0%	26.3%	16.4%	27.8%	17.1%	12.2%	8.9%	10.6%	6.5%		11.4%	7.6%	9.4%
% Remanded.....	8.9%	8.2%	10.9%	6.4%	2.1%	1.0%	1.0%	4.0%	0.9%	2.0%	N/A	7.4%	5.6%	1.9%
% Withdrawn(and other).												2.0%	2.0%	11.3%
% Denied.....	68.8%	67.8%	62.8%	77.2%	70.1%	81.9%	86.8%	87.1%	88.5%	91.5%		79.2%	84.8%	77.4%
Travel Board Hearings....	366	377	327	356	364	328	429	466	505	484	485	451	502	77
Offices Visited.....	29	37	29	33	36	30	40	35	39	35	35	33	38	7
% Allowed.....						26.5%	22.4%	22.4%	31.0%	32.0%	29.3%	28.5%	35.5%	35.0%
Categories of Appeals														
Disab Compensation.....									76.2%	76.4%		77.7%	78.3%	76.8%
Disab Pension.....									7.3%	7.3%		5.9%	5.5%	6.0%
Medical.....									1.2%	1.4%		1.4%	1.6%	1.5%
Insurance.....									0.5%	0.5%		0.3%	0.3%	0.2%
Death.....									6.8%	7.0%		6.4%	6.0%	5.7%
Training.....									2.6%	2.9%	N/A	2.5%	2.1%	2.6%
Waiver.....									4.0%	2.9%		3.6%	4.3%	5.4%
Loan Guaranty.....									0.5%	0.8%		0.6%	0.5%	0.6%
Reconsiderations.....									0.6%	0.6%		0.6%	0.7%	0.6%
Character of Disch.....									0.3%	0.2%		0.3%	0.2%	0.3%
FIELD AND BVA COMBINED														
Final Dispositions.....	39,505	47,813	54,023	53,515	46,000	43,508	50,431	60,613	59,048	55,127	58,783	58,068	61,352	16,227
% Allowed.....	27.3%	24.7%	25.2%	26.1%	25.7%	25.0%	25.1%	23.3%	24.8%	25.3%	22.8%	23.8%	21.3%	21.0%
% Closed.....	28.5%	30.1%	29.1%	28.6%	27.4%	27.1%	26.7%	29.9%	21.6%	17.5%	24.1%	21.7%	25.3%	21.6%
% Withdrawn(and other).	6.9%	6.8%	6.2%	7.1%	7.6%	9.0%	8.7%	7.8%	9.1%	10.8%	11.2%	12.7%	11.9%	17.3%
% Denied.....	37.3%	38.4%	39.5%	38.2%	39.3%	38.9%	39.5%	39.0%	44.5%	46.4%	41.9%	41.8%	41.4%	40.1%
Response Time - Days.....	232	256	242	233	236	251	260	294	307	323	358	443	483	493
NOD to SOC.....	47	51	53	50	53	57	57	66	53	53	54	62	61	55
SOC to SA.....	48	48	49	50	52	53	54	52	55	54	58	64	56	58
SA to Cert.....1/....	65	66	64	68	74	72	75	74	77	89	90	90	90	90
Cert to Callup...1/ 2/.	..	..	..	..	..	..	..	..	..	..	56	126	176	185
Callup to BVA Decn.....	72	91	76	65	57	69	74	102	122	127	100	101	100	105
Pending - End of Period..	24,215	26,291	27,360	25,326	23,517	27,723	31,457	37,262	46,116	47,488	51,337	55,443	59,776	60,927
Field: NOD's.....	12,983	14,025	14,600	13,232	12,710	15,332	16,604	17,574	23,716	24,372	25,768	23,633	21,726	21,505
Subs. Appeals..	5,879	6,669	7,529	7,701	6,909	7,498	8,309	8,218	9,916	11,480	17,757	22,773	25,935	26,385
BVA: Subs. Appeals..	5,353	5,597	5,231	4,393	3,898	4,893	6,544	11,470	12,484	11,636	7,812	9,037	12,115	13,037

Pif's Ex No. 60
(Standefer Depo.)

1/ VAROIS Callup procedures instituted in FY 1980.
2/ SA to Cert estimated to be 90 days -- FY 1980 and beyond. Remainder charged to the BVA.

Appeals Stat Data J5

AOO191

OMB No. 2900-0085

Veterans Administration

IMPORTANT: Read instructions on reverse side before filling in form. Complete all items fully. Send this appeal to the VA office which made the decision being appealed.

VETERANS ADMINISTRATION

APPEAL TO BOARD OF VETERANS APPEALS

1 LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)	2 INSURANCE FILE NO OR LOAN NO (If applicable)	3 CLAIM FILE NO (Include prefix)
CORDRAY, Don E.		C-24 942 530

4 IF APPEAL IS BEING MADE BY A PERSON OTHER THAN VETERAN INDICATE RELATIONSHIP

☐ WIDOW ☐ CHILD ☐ MOTHER ☐ FATHER ☐ OTHER (Specify)

5 NAME OF CLAIMANT (If other than veteran)	6 ADDRESS OF CLAIMANT (Number & street, city, State & ZIP Code)

7 DATE OF DECISION BEING APPEALED	8 VA OFFICE WHICH MADE DECISION BEING APPEALED (City & State)
[illegible]	[illegible]

REPRESENTATION ➧ See Par 6 of instructions on reverse side [redacted] - None

HEARING ➧ See Par 7 of instructions on reverse side.

9A. DO YOU WISH TO BE PRESENT AT A HEARING? ☒ YES ☐ NO

9B. IF YES SPECIFY PLACE ☐ FIELD OFFICE ☐ WASHINGTON D.C. Little Rock, Ark.

NOTE: A personal hearing is not necessary nor is a decision made at the time of the hearing.

10. I TAKE ISSUE WITH THE DECISION CITED ABOVE AND HEREBY PETITION THE BOARD OF VETERANS APPEALS FOR RELIEF AS SET FORTH BELOW (State in specific detail the benefits sought on appeal and your reasons for believing that the action appealed from is erroneous. Follow carefully the instructions in paragraph 3 on the reverse side.)

Plf's Ex. No. 62
(Standefer Depo.)

(Attach additional sheets, if necessary)

11. DATE	12 SIGNATURE OF CLAIMANT (Or representative)
	Don E. Cordray

VA FORM 1-9 AUG 1981

SUPERSEDES VA FORM 1-9, JUN 1979, WHICH WILL NOT BE USED.

MISSION OF THE BOARD OF VETERANS APPEALS

The Board of Veterans Appeals was established by law to decide appeals for benefits under laws administered by the Veterans Administration (38 U.S.C. 4001 - 4009). Decisions are made by the Members of a Section of the Board, appointed with the approval of the President. It is the mission of the Board to decide appeals with sympathetic understanding and as promptly as possible, in order to grant all benefits to which veterans and their dependents and beneficiaries are entitled. Decisions are based on the entire record and will not be limited to that cited in the Statement of the Case.

GENERAL INFORMATION

The law grants the right to have an adjudication decision reviewed on appeal by the Board of Veterans Appeals. (38 U.S.C. 4004(a)). If you want to appeal, the procedure is as follows:

(1) *Write the Veterans Administration office* expressing disagreement or dissatisfaction with the decision on the claim. This is a "Notice of Disagreement." It must be filed within 1 year from the mailing of notice of the decision (60 days where 2 or more persons claim same benefit).

(2) *A "Statement of the Case" is then sent the claimant and his representative by the Veterans Administration office.* It contains a summary of the facts, the applicable law and regulations and gives the reasons for the decision. Its purpose is to give the claimant sufficient information to complete his appeal in the most effective manner, if appellate review is still desired.

(3) *File a "Substantive Appeal."* This completes the appeal. Use this form VA Form 1-9. Follow the instructions below.

PRIVACY ACT NOTICE

The information requested on this form is solicited under 38 U.S.C. 4005 (d)(3). It is used by the Board in identifying those areas of disagreement requiring appellate review, and is mandatory for completion of your appeal. The information may be disclosed outside the VA as permitted by law, or as stated in the "Notices of Systems of VA Records" which have been published in the Federal Register in accordance with the Privacy Act of 1974. Failure to furnish this information will have no adverse effect on any other benefit to which you may be entitled.

INSTRUCTIONS

IMPORTANT: Use this form to file a substantive appeal only after receiving the statement of the case referred to above.

1. WHO CAN SIGN A SUBSTANTIVE APPEAL. A substantive appeal may be signed by:

(a) The claimant personally.

(b) The accredited representative of a service organization provided a proper power of attorney is filed, or by an attorney provided a proper declaration of representation is filed.

(c) The guardian or other proper fiduciary of an incompetent claimant, or, if none, by the next of kin or next friend.

2. TIME LIMIT FOR FILING. A substantive appeal should be filed within 60 days after the statement of the case is mailed (60 days where 2 or more contesting claimants are involved). The 30 day period applies only where one claim is allowed and another denied, or allowance of one claim would result in a lesser payment to another claimant. An extension of time may be granted for good cause. A substantive appeal postmarked prior to expiration of the applicable period will be accepted as timely filed. (38 U.S.C. 4005(d)(3), 4005A(b)).

3. FORM OF APPLICATION. This form should be used for filing a substantive appeal. The benefit sought must be clearly identified. The date of the action appealed should be inserted in item 7. In completing item 10, care should be taken to set out errors of fact or law believed to have been made in the decision — that is, the reasons for disagreeing with the decision being appealed. Insofar as possible, relate all statements to specific items in the statement of the case. Identify any statement of fact in the statement of the case with which there is disagreement. The claimant will be presumed to be in agreement with facts stated to which no exception is taken. An appeal which is insufficient may be dismissed.

4. PLACE TO SEND SUBSTANTIVE APPEAL. The substantive appeal should be mailed to or filed with the Veterans Administration office which entered the decision being appealed.

5. SUBMISSION OF ADDITIONAL EVIDENCE. Where a substantive appeal is timely filed, a reasonable time will be granted, if requested, to file additional evidence before final consideration of the appeal. Any additional evidence should be submitted to the Veterans Administration office in which the appeal was filed.

6. REPRESENTATION. A claimant may be represented in the presentation of his claim by a recognized service organization provided a proper power of attorney is furnished, or by an attorney provided a proper declaration of representation is furnished. Only one representative is permitted at any one time in the prosecution of a specific claim. A form for filing power of attorney may be obtained from the local Veterans Administration office. (38 CFR 19.129, 19.130, 19.142).

7. HEARING ON APPEAL. Read carefully).

a. Hearing Granted, If Desired, And Conducted Informally. A hearing will be granted where a claimant or his representative expresses a desire for a personal appearance. The Board operates under Rules of Practice, but its procedures are informal. They are designed to make it easy for a claimant or his representative to present argument or testimony relevant and material to the appellate issue. Strict rules of evidence are not followed. However, a personal hearing is not necessary. All evidence on file is thoroughly considered regardless of whether a hearing has been held.

IMPORTANT: If a hearing is desired, such request should be made by completing items 9A and 9B, indicating the place of hearing (Veterans Administration field office or Washington, D.C. See subparagraph b, below.

b. Who May Appear. The claimant, his representative, or both, may be heard. Either may arrange for the voluntary appearance of witnesses to testify.

c. Place of Hearing. A hearing may be held at one of the following places selected by the claimant or his representative:

(1) In Washington, D.C., before a Section of the Board of Veterans Appeals.

(2) In the Veterans Administration field office which originally decided the claim or, if more convenient, any other Veterans Administration field office which has appropriate personnel and technical facilities for conducting a hearing. In that event, the field office personnel act as a hearing agency for the Board of Veterans Appeals, but do not decide the appeal.

There is no provision for the Government to bear any expense incurred by the claimant, his counsel or witnesses in connection with attendance at a hearing.

8. ORDER OF CONSIDERATION. Appeals are docketed and considered in the order in which they are received, except that for sufficient cause the Board may advance a case on the docket. (38 U.S.C. 4007.)

FOR VA USE ONLY

APPEAL RECEIVED (VA Use Only)

APPEAL RECORDED (Date)

US GOVERNMENT PRINTING OFFICE 1982 - 361-488/3736

62-2

BOARD OF VETERANS APPEALS
Disposition of Appeals by Type of Hearing
Fiscal Year 1982

January 11, 1983

Category of Issue	Hearing	Allowed		Remanded		Denied		Other		Total
Character of Discharge	VACO	-		1		2		-		3
	Tvl Bd	1		1		2		-		4
	Rtg Bd	-		3		24		-		27
	None	3		3		53		1		60
	Total	4	(5.1%)	8	(11.0%)	81	(83.6%)	1	(1.4%)	73
Disability Compensation	VACO	212	(19.0%)	223	(19.9%	674	(60.3%)	9	(0.8%)	1118
	Tvl Bd	176	(34.4%)	80	(15.7%)	252	(49.3%)	3	(0.6%)	511
	Rtg Bd	1133	(13.9%)	889	(10.9%)	6092	(74.8%)	26	(0.3%)	8140
	None	2354	(12.9%)	2916	(16.0%)	12790	(70.2%)	170	(0.9%)	18228
	Total	3875	(13.8%)	4108	(14.7%)	19808	(70.8%)	208	(0.7%)	27997
Disability Pension	VACO	4		3		17		-		24
	Tvl Bd	6		1		5		-		12
	Rtg Bd	20	(6.1%)	31	(9.4%)	277	(84.2%)	1	(0.3%)	329
	None	132	(8.2%)	240	(14.9%)	1221	(75.6%)	23	(1.4%)	1616
	Total	162	(8.2%)	275	(13.9%)	1520	(76.7%)	24	(1.2%)	1981
Death Compensation	VACO	10	(16.9%)	13	(22.0%)	36	(61.0%)	-		59
	Tvl Bd	6		-		19		1		26
	Rtg Bd	33	(8.9%)	49	(13.2%)	286	(77.3%)	2	(0.5%)	370
	None	126	(9.4%)	231	(17.3%)	976	(73.0%)	4	(0.3%)	1337
	Total	175	(9.8%)	293	(16.4%)	1317	(73.5%)	7	(0.4%)	1792
Death Pension	VACO	1		-		7		-		8
	Tvl Bd	1		-		1		-		2
	Rtg Bd	7	(9.7%)	9	(12.5%)	54	(75.0%)	2	(2.8%)	72
	None	23	(8.4%)	49	(17.9%)	200	(73.0%)	2	(0.7%)	274
	Total	32	(9.0%)	58	(16.3%)	262	(73.6%)	4	(1.1%)	356
Forfeiture	VACO	-		-		-		-		0
	Tvl Bd	-		-		-		-		0
	Rtg Bd	-		1		3		-		4
	None	1		5		10		1		15
	Total	1	(5.3%)	6	(21.1%)	13	(68.4%)	1	(5.3%)	19
Hospital/Outpatient Treatment	VACO	3		2		5		1		11
	Tvl Bd	-		-		4		-		4
	Rtg Bd	7	(7.8%)	6	(6.7%)	76	(84.4%)	1	(1.1%)	90
	None	35	(7.4%)	95	(20.0%)	337	(70.8%)	10	(2.1%)	476
	Total	45	(7.7%)	103	(17.7%)	422	(72.5%)	12	(2.1%)	581
Insurance	VACO	2		-		1		-		3
	Tvl Bd	1		-		-		-		1
	Rtg Bd	1		2		22		-		25
	None	1	(1.4%)	7	(9.7%)	62	(86.1%)	2	(2.8%)	72
	Total	5	(5.0%)	9	(8.9%)	85	(84.2%)	2	(2.0%)	101
Loan Guaranty	VACO	-		-		1		-		1
	Tvl Bd	-		-		-		-		0
	Rtg Bd	9	(20.5%)	9	(20.5%)	26	(59.1%)	-		44
	None	13	(10.1%)	51	(39.5%)	63	(48.8%)	2	(1.6%)	129
	Total	22	(12.6%)	68	(38.5%)	90	(51.7%)	2	(1.1%)	174
Vocational Rehabilitation and Education	VACO	6		2		15		-		23
	Tvl Bd	-		-		7		-		7
	Rtg Bd	17	(10.3%)	24	(14.5%)	123	(74.5%)	1	(0.6%)	165
	None	55	(10.2%)	91	(16.9%)	386	(71.9%)	5	(0.9%)	537
	Total	78	(10.7%)	117	(16.0%)	531	(72.9%)	6	(0.8%)	732
Survivors' and Dependents' Educational Assistance	VACO	-		-		1		-		1
	Tvl Bd	-		-		-		-		0
	Rtg Bd	-		-		5		-		5
	None	1		5		9		1		16
	Total	1	(4.5%)	5	(22.7%)	15	(68.2%)	1	(4.5%)	22
Waivers	VACO	2		6		14		-		20
	Tvl Bd	4		-		1		-		5
	Rtg Bd	27	(12.9%)	53	(25.2%)	129	(61.4%)	1	(0.5%)	210
	None	187	(14.3%)	294	(22.5%)	814	(62.3%)	12	(0.9%)	1307
	Total	220	(14.3%)	353	(22.8%)	958	(62.1%)	13	(0.8%)	1542
Miscellaneous	VACO	1		-		5		-		6
	Tvl Bd	-		-		-		-		-
	Rtg Bd	-		1		21		1		23
	None	22	(11.0%)	24	(12.0%)	145	(68.8%)	15	(7.3%)	206
	Total	23	(9.4%)	25	(10.2%)	171	(73.2%)	16	(6.5%)	235
Reconsiderations	VACO	3	(5.9%)	3	(5.9%)	45	(88.2%)	-		51
	Tvl Bd	-		-		11		-		11
	Rtg Bd	1	(2.4%)	-		40	(97.6%)	-		41
	None	15	(10.2%)	11	(7.5%)	116	(78.9%)	5	(3.4%)	147
	Total	19	(7.6%)	14	(5.6%)	212	(84.8%)	5	(2.0%)	250
AGGREGATE	VACO	344	(18.4%)	351	(18.9%)	823	(63.0%)	10	(0.8%)	1379
	Tvl Bd	195	(33.4%)	82	(14.1%)	302	(51.8%)	4	(0.7%)	583
	Rtg Bd	1295	(13.1%)	1077	(11.3%)	7178	(75.3%)	35	(0.4%)	9545
	None	2957	(12.2%)	4008	(16.5%)	17302	(70.3)	145	(1.0%)	24302
	Total	4851	(13.0%)	5518	(15.2%)	25395	(71.0%)	194	(0.8%)	35958

Pltf's Ex No. 63 (Steindler Depo)

A0058

Disps by Type Hrg 25

(1048) 916

Regional Office

211 Main Street
San Francisco, CA 94105

Veterans Administration

Mr. Reasons Warehime, Jr.
P. O. Box 398
Riverdale, CA 93656

Dear Mr. Warehime:

We have your substantive appeal wherein you indicated you wanted a personal hearing.

You are, of course, entitled to a personal hearing. It is, however, our responsibility to advise you of certain facts. First, due to the backlog of scheduled hearings, it would be most likely several months before a personal hearing could be held, and with the time allowed for typing the transcript of the hearing, it could result in a substantial delay in submission of your appeal to the Board of Veterans Appeals in Washington, D.C. Secondly, a personal hearing in the Veterans Administration Regional Office, San Francisco, would be before the local rating board which has evaluated your case previously, not the Board of Veterans Appeals personnel. Thirdly, certified statements carry as much weight as in-person testimony. Fourthly, if you do not have new and material evidence, preferably medical, but would be merely restating previously furnished information, no change could be made based on the personal hearing alone.

If you still wish to have a personal hearing, please advise us within 30 days, and we will be happy to schedule one for you. If we do not hear from you, we will assume you wish your appeal to be certified to the Board of Veterans Appeals without further delay for a hearing.

Sincerely yours,

T. A. VERRILL
Adjudication Officer
cc:
Disabled American Veterans

In Reply Refer To: 343/215 C-13 005 384

PH's Ex No 64
(Standefer Depo.)

EXHIBIT H

(1049)
(917)

PERCENTAGE OF APPEALED CASES RECEIVING FORMAL HEARING IN FISCAL YEAR 1982

	Total	Formal Hearing
Disability Compensation	27,997	9,769 (34.9%)
Disability Pension	1,981	365 (18.4%)
Death Compensation	1,792	455 (25.4%)
Death Pension	356	82 (23.0%)

- prepared from Exhibit DD to the Veterans Administration's March 18, 1983 response to Plaintiff's Freedom of Information Act Request

PH's Ex. No. 65
(Standefer Depo)

~~1050~~ 918

PERCENTAGE OF APPEALED CASES RECEIVING FORMAL HEARING in FISCAL YEAR 1977

	Total	Formal Hearing
Disability Compensation	24,452	4,260 (17.4%)
Disability Pension	2,839	183 (6.4%)
Death Compensation	6	0 (0%)
Dependent/Indemnity Compensation	1,774	219 (12.3%)
Death Pension	437	49 (11.0%)

- prepared from Exhibit G to the Veterans Administration's February 4, 1983 response to Plaintiff's Freedom of Information Act Request

Plf's Ex. No. 66
(Standefer Depo.)

1057
919

DISPOSITION OF APPEALED CASES
BY TYPE OF CLAIM AND TYPE OF HEARING
10/01/81 - 09/30/82

	% Allowed	% Remanded	% Denied	Total
Disability Compensation	1) 18.9	1) 19	1) 60.3	1,118
	2) 34.4	2) 15.1	2) 49.3	511
	3) 13.9	3) 10.1	3) 74.8	8,140
	Other: 12.9	Other: 13.7	Other: 70.7	18,228
Disability Pension	1) 16.7	1) 12.5	1) 70.8	24
	2) 50	2) 8.3	2) 41.7	12
	3) 6.1	3) 8.5	3) 84.1	329
	Other: 8.7	Other: 12.9	Other: 75.6	1,616
Death Compensation	1) 16.9	1) 20.3	1) 61	59
	2) 23.1	2) 0	2) 73.1	26
	3) 8.9	3) 11.9	3) 77.3	370
	Other: 9.4	Other: 14.8	Other: 72.9	1,337
Death Pension	1) 12.5	1) 0	1) 87.5	8
	2) 50	2) 0	2) 50	2
	3) 9.7	3) 12.5	3) 75	72
	Other: 8.4	Other: 13.5	Other: 72.9	274

1) Formal hearing, at Washington, D.C.
2) Formal hearing, before Traveling Section of BVA
3) Formal hearing, before Rating Board in Field Office
Other: No formal hearing

- prepared from Exhibit DD to the Veterans Administration's 03/18/83 response to Plaintiff's Freedom of Information Act Request

Plf's Ex No. 67 (Standefer Depo.)

67-

~~1052~~ 920

DISPOSITION OF APPEALED CASES BY TYPE OF CLAIM AND TYPE OF HEARING FISCAL YEAR 1977

	% Allowed	% Remanded	% Denied	Total
Disability Compensation	1) 17.5	1) 23.4	1) 60	578
	2) 22.3	2) 15.1	2) 62.5	610
	3) 13.2	3) 12.9	3) 73.7	3,072
	Other: 13	Other: 16	Other: 70.6	20,192
Disability Pension	1) 29.1	1) 20.8	1) 50	24
	2) 11.1	2) 22.2	2) 66.7	18
	3) 13.5	3) 11.3	3) 75.2	141
	Other: 9.2	Other: 14.8	Other: 75.8	2,656
Death Compensation	1) 0	1) 0	1) 0	0
	2) 0	2) 0	2) 0	0
	3) 0	3) 0	3) 0	0
	Other: 0	Other: 33.3	Other: 66.7	6
Dependent/ Indemnity Compensation	1) 20.6	1) 23.5	1) 55.9	34
	2) 36.4	2) 9.1	2) 54.9	33
	3) 13.2	3) 17.8	3) 69.1	152
	Other: 13.4	Other: 19.4	Other: 66.9	1,555
Death Pension	1) 20	1) 0	1) 80	5
	2) 33.3	2) 33.3	2) 33.3	3
	3) 17.5	3) 5	3) 77.5	40
	Other: 11.8	Other: 17.5	Other: 70.7	389

Pl's Ex. No. 68
(Stipulated Fact)

1) Formal, at Washington, D.C.
2) Formal, before Traveling Section of BVA
3) Formal, before Rating Board in Field Office
Other: No formal hearing

68-1

- prepared from Exhibit G to the Veterans Administration's 02/04/83 response to Plaintiff's Freedom of Information Act Request

~~4053~~
(924)

BOARD OF VETERANS APPEALS DECISIONS

DISPOSITIONS BY TYPE OF HEARING
AND
CATEGORY OF BENEFIT INVOLVED

FY 1977

Type of Hearing: Formal, at Washington, D.C. (Code: 1)

BENEFIT CATEGORY	TOTAL CASES	ALLOWED	REMANDED	DENIED	OTHER
Disability Compensation	578	101	135	341	1
Disability Pension	24	7	5	12	0
Death Compensation	0	0	0	0	0
Dependency and Indemnity Compensation	34	7	8	19	0
Death Pension	5	1	0	4	0
Insurance	7	0	1	6	0
Vocational Rehabilitation and Education	11	4	1	6	0
War Orphans Education	0	0	0	0	0
Forfeiture	0	0	0	0	0
Waivers	11	2	1	8	0
Hospital and Outpatient Treatment	9	1	2	6	0
Loan Guaranty	1	0	0	1	0
Character of Discharge	4	2	0	2	0
Reconsiderations	10	0	1	9	0
Miscellaneous	5	2	1	2	0
TOTALS	699	127	155	416	1
Percent		18.2	22.2	59.5	0.1

922

BOARD OF VETERANS APPEALS DECISIONS
DISPOSITIONS BY TYPE OF HEARING AND CATEGORY OF BENEFIT INVOLVED
FY 1977

Type of Hearing: Formal, before Traveling Section of BVA (Code: 2)

BENEFIT CATEGORY	TOTAL CASES	ALLOWED	REMANDED	DENIED	OTHER
Disability Compensation	610	136	92	381	1
Disability Pension	18	2	4	12	0
Death Compensation	0	0	0	0	0
Dependency and Indemnity Compensation	33	12	3	18	0
Death Pension	3	1	1	1	0
Insurance	9	0	1	8	0
Vocational Rehabilitation and Education	16	5	2	9	0
War Orphans Education	0	0	0	0	0
Forfeiture	0	0	0	0	0
Waivers	9	2	2	5	0
Hospital and Outpatient Treatment	5	0	2	3	0
Loan Guaranty	1	1	0	0	0
Character of Discharge	4	0	0	4	0
Reconsiderations	3	0	0	3	0
Miscellaneous	2	0	0	2	0
TOTALS	713	159	107	446	1
Percent		22.3	15.0	62.6	0.1

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68-3

~~1055~~ 923

BOARD OF VETERANS APPEALS DECISIONS

DISPOSITIONS BY TYPE OF HEARING
AND
CATEGORY OF BENEFIT INVOLVED

FY 1977

Type of Hearing: Formal, before Rating Board in Field Office (Code: 3)

BENEFIT CATEGORY	TOTAL CASES	ALLOWED	REMANDED	DENIED	OTHER
Disability Compensation	3,072	407	395	2,264	6
Disability Pension	141	19	16	106	0
Death Compensation	0	0	0	0	0
Dependency and Indemnity Compensation	152	20	27	105	0
Death Pension	40	7	2	31	0
Insurance	17	3	2	12	0
Vocational Rehabilitation and Education	78	12	3	63	0
War Orphans Education	2	1	0	1	0
Forfeiture	20	0	0	20	0
Waivers	64	4	4	54	2
Hospital and Outpatient Treatment	20	1	3	16	0
Loan Guaranty	15	1	4	9	1
Character of Discharge	41	5	2	34	0
Reconsiderations	11	1	3	7	0
Miscellaneous	12	1	3	8	0
TOTALS	3,685	482	464	2,370	9
Percent		13.1	12.6	74.1	0.2

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68-4

(1056)
(924)

BOARD OF VETERANS APPEALS DECISIONS
DISPOSITIONS BY TYPE OF HEARING AND CATEGORY OF BENEFIT INVOLVED
FY 1977

Type of Hearing: No formal hearing (Code: Other)

BENEFIT CATEGORY	TOTAL CASES	ALLOWED	REMANDED	DENIED	OTHER
Disability Compensation	20,192	2,618	3,240	14,249	85
Disability Pension	2,656	244	392	2,012	8
Death Compensation	6	0	2	4	0
Dependency and Indemnity Compensation	1,555	208	302	1,040	5
Death Pension	389	46	68	275	0
Insurance	192	8	21	159	4
Vocational Rehabilitation and Education	766	78	96	589	3
War Orphans Education	23	3	4	16	0
Forfeiture	267	2	0	264	1
Waivers	1,011	143	154	707	7
Hospital and Outpatient Treatment	416	40	68	305	3
Loan Guaranty	136	14	51	70	1
Character of Discharge	131	12	13	105	1
Reconsiderations	116	15	8	92	1
Miscellaneous	155	13	27	98	17
TOTALS	28,011	3,444	4,446	19,985	136
Percent		12.3	15.9	71.3	0.5

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68-5

(1057) 925

BOARD OF VETERANS APPEALS

TRAVEL BOARDS
REPRESENTATION IN APPEALED CASES
FY 1982

January 11, 1983

Hearings held: 502
Decisions entered: 372
Appeals pending: 130

Representation	Total Cases	%	Allowed	%	Remanded	%	Denied	%	Other	%
AL	58	15.6	18	31.0	11	19.0	29	50.0	0	0
AMVETS	4	1.1	1	25.0	1	25.0	2	50.0	0	0
ARC	25	6.7	8	32.0	3	12.0	14	56.0	0	0
CWV	0	0	0	0	0	0	0	0	0	0
DAV	166	44.6	67	40.4	37	22.3	60	36.1	2	1.2
JWV	1	0.3	1	100.0	0	0	0	0	0	0
VFW	37	9.9	9	24.3	5	13.5	23	62.2	0	0
Atty/Agt	9	2.4	2	22.2	2	22.2	5	55.6	0	0
Other	52	14.0	9	17.3	13	25.0	29	56.0	1	1.9
None	20	5.4	9	45.0	3	15.0	8	40.0	0	0
Total	372	100.0	124	33.3	75	20.2	170	45.7	3	0.8
No Repr.	20	5.4	9	45.0	3	15.0	8	40.0	0	0
With Repr.	352	95.0	115	32.7	72	20.5	162	46.0	3	0.9

Tvl Bd Repr-FY 1982 J3

Plf's Ex. No. 69
(Standefer Depo.)

A01333
69-1

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926

BOARD OF VETERANS APPEALS

TRAVEL BOARDS
REPRESENTATION IN APPEALED CASES
FY 1981

December 6, 1982

Hearings held: 451
Decisions entered: 451
Appeals pending: 0

Representation	Total Cases	%	Allowed	%	Remanded	%	Denied	%	Other	%
AL	73	16.2	17	23.3	11	15.1	45	61.6	0	0
AMVETS	6	1.3	4	66.7	1	16.7	1	16.7	0	0
ARC	17	3.8	2	11.8	5	29.4	10	58.8	0	0
CWV	0	0	0	0	0	0	0	0	0	0
DAV	169	37.5	52	30.8	21	12.4	90	53.3	6	3.6
JWV	2	0.4	0	0	1	50.0	1	50.0	0	0
VFW	62	13.7	18	29.0	11	17.7	33	53.2	0	0
Atty/Agt	27	6.0	8	29.6	5	18.5	14	51.9	0	0
Other	71	15.7	21	29.6	9	12.7	41	57.7	0	0
None	24	5.3	6	25.0	4	16.7	14	58.3	0	0
Total	451	100.0	128	28.4	68	15.1	249	55.2	6	1.3
No Repr.	24	5.3	6	25.0	4	16.7	14	58.3	0	0
With Repr.	427	94.7	122	28.6	64	15.0	235	55.0	6	1.4

Tvl Bd Repr-FY 1981 J3

A01000
69-2

1059
927

TRAVEL BOARD
REPRESENTATION IN APPEALED CASES
FY 1980

Total Hearings: 474
Total Decisions: 474
Total Pending: 0

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	17	3.6	5	29.4	3	17.6	9	52.9	0	-
AL	76	16.0	19	25.0	8	10.5	49	64.5	0	-
VFW	63	13.3	15	23.8	9	14.3	38	60.3	1	1.6
DAV	171	36.1	54	31.6	37	21.6	80	46.8	0	-
ANRC	20	4.2	8	40.0	3	15.0	8	40.0	1	5.0
AMVETS	9	1.9	2	22.2	2	22.2	5	55.6	0	-
CWV	0	-	0	-	0	-	0	-	0	-
JWV	8	1.7	1	12.5	1	12.5	3	37.5	3	37.5
Attys/Agts	35	7.4	10	28.6	5	14.3	20	57.1	0	-
Other	75	15.8	25	33.3	15	20.0	34	45.3	1	1.3
TOTAL	474		139	29.3	83	17.5	246	51.9	6	1.3
No Repr.	17	3.6	5	29.4	3	17.6	9	52.9	0	-
Cases With Repr.	457	96.4	134	29.3	80	17.5	237	51.9	6	1.3

JANUARY 1982

Mrs. Rezar
MRS. REZAR

A01561
69-3

4060
928

TRAVEL BOARD
REPRESENTATION IN APPEALED CASES
FY 1979

Total Hearings: 485
Total Decisions: 485
Total Pending: 0

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	32	6.6	10	31.2	6	18.8	15	46.9	1	3.1
AL	80	16.5	25	31.2	9	11.2	43	53.8	3	3.8
VFW	66	13.6	17	25.8	12	18.2	36	54.5	1	1.5
DAV	171	35.3	58	33.9	20	11.7	85	49.7	8	4.7
ANRC	23	4.7	10	43.5	5	21.7	8	34.8	0	-
AMVETS	13	2.7	4	30.8	2	15.4	7	53.8	0	-
CWV	0	-	0	-	0	-	0	-	0	-
JWV	2	0.4	0	-	0	-	2	-	0	-
Attys/Agts	25	5.2	8	32.0	3	12.0	13	52.0	1	4.0
Other	73	15.1	23	31.5	9	12.3	37	50.7	4	5.5
TOTAL	485		155	32.0	66	13.6	246	50.7	18	3.7
No Repr.	32	6.6	10	31.2	6	18.8	15	46.9	1	3.1
Cases With Repr.	453	93.4	145	32.0	60	13.2	231	51.0	17	3.8

April 1981

Mrs Rezar
MRS. REZAR

A01565

69.4

TRAVEL BOARD
REPRESENTATION IN APPEALED CASES
FY 1978 Completed 6/20/80

Total Hearings: 505
Total Decisions: 500
Total Pending: 0
5 special hearings on Mankoto cases
1 Mankoto case completed - Denied - 12/3/79 4 Mankoto cases pendi

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	27	5.4	12	44.4	1	3.7	13	48.1	1	3.7
AL	83	16.6	22	26.5	14	17.0	47	57.0	0	-
VFW	67	13.4	9	13.4	9	13.4	37	55.2	2	3.0
DAV	200	40.0	66	33.0	22	11.0	107	53.5	5	2.5
ANRC	22	4.4	3	13.6	0	-	16	73.0	3	13.6
AMVETS	13	2.6	5	38.4	1	7.7	7	54.0	0	-
CWV	0	-	0	-	0	-	0	-	0	-
JWV	1	0.2	0	-	0	-	1	100.0	0	-
Attys/Agts	24	4.8	8	33.3	3	12.5	13	54.1	0	-
Other	63	12.6	19	30.1	10	16.0	32	51.0	2	3.2
TOTAL	500	-	153	31.0	60	12.0	273	55.0	13	2.6
No Repr.	27	5.4	12	44.4	1	3.7	13	48.1	0	3.7
Cases With Repr.	474	95.0	142	30.0	59	12.4	260	55.0	13	2.7

June 23, 1980

Mrs Rezar
MRS. REZAR

A01562

69.5

(1062)
(930)

TRAVEL BOARD
REPRESENTATION IN APPEALED CASES
FY 1977 - COMPLETED - 6/19/80

Total Hearings: 469
Total Decisions: 469
Total Pending: 0

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	19	4.1	3	15.8	3	15.8	13	68.4	0	-
AL	97	20.7	20	20.6	14	14.4	58	59.8	5	5.2
VFW	71	15.1	13	18.3	13	18.3	43	60.6	2	2.8
DAV	160	34.1	35	22.0	21	13.1	100	63.0	4	2.5
ANRC	11	2.4	2	18.1	0	-	9	82.0	0	-
AMVETS	7	1.5	1	14.3	0	-	6	86.0	0	-
CWV	1	0.2	0	-	1	100.0	0	-	0	-
JWV	1	0.2	0	-	0	-	1	100.0	0	-
Attys/Agts	10	2.1	2	20.0	3	30.0	5	50.0	0	-
Other	92	19.6	29	31.5	11	12.0	50	54.3	2	2.2
TOTAL	469	-	105	22.4	66	14.1	285	61.0	13	2.8
No Repr.	19	4.0	3	15.8	3	15.8	13	64.4	0	-
Cases With Repr.	450	96.0	102	22.7	63	14.0	272	60.4	13	3.0

June 19, 1980
Mrs Rezar
MRS. REZAR

A01500

69-6

931

TRAVEL BOARD
REPRESENTATION IN APPEALED CASES
FY 1976 COMPLETED

Total Hearings: 429
Total Decisions: 429
Total Pending: 0

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	34	7.9	7	20.6	4	11.8	23	67.6	0	--
AL	81	18.9	13	16.0	17	21.0	51	63.0	0	--
VFW	64	14.9	12	18.8	14	21.9	37	57.8	1	1.6
DAV	144	33.6	38	26.4	28	19.4	73	50.7	5	3.5
ANRC	23	5.4	5	21.7	5	21.7	13	56.5	0	--
AMVETS	9	2.1	1	11.1	2	22.2	6	66.7	0	--
CWV	0	--	0	--	0	--	0	--	0	--
JWV	3	0.7	0	--	1	33.3	2	66.7	0	--
Attys/Agts	13	3.0	4	30.8	2	15.4	7	53.8	0	--
Other	58	13.5	16	27.6	8	13.8	32	55.2	2	3.4
TOTAL	429	100.0	96	22.4	81	18.9	244	56.9	8	1.9
No Repr.	32	7.5	7	21.9	4	12.5	21	65.6	0	--
Cases With Repr.	397	92.5	89	22.4	77	19.4	223	56.2	8	2.0

Mrs. Rezar
MRS. REZAR
3/28/79

A01555
69-7

LEGAL SERVICES CORPORATION
REPORT TO CONGRESS
ON ACCESS OF VETERANS LEGAL ASSISTANCE

CHAPTER II

The Special Legal Problems and Special Difficulties of Access of Veterans

A. *Introduction*—There are approximately 30 million veterans in the United States. While poverty data on veterans are sketchy, research has shown that, as of September 30, 1978, over one million families were households headed by a veteran and had incomes below the poverty level.[1] Based on this data, we estimate that the number of poor veterans and dependents probably exceeds 4 million persons, over 10% of all the poor people in the United States.

It is clear that veterans constitute a significant segment of the client populations of all legal services programs. Beyond this initial conclusion, however, it is difficult to draw conclusions about the needs, problems and access difficulties confronting veterans or about legal services programs' service to veterans. There are two main reasons for this difficulty.

First, it is rare for any publicly funded service delivery system to keep records showing whether its clients are veterans. This is true of legal services programs. Very few cases handled by programs focus on veterans status,

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[1] Interview with Comptroller's Office, Veterans Administration (January 1979). This figure is merely the number of veterans actually receiving poverty-based VA pensions. It is the reliable absolute minimum. It does not take into account veterans (and dependents of veterans) unaware of their pension rights or veterans holding discharges making them ineligible for benefits.

these, 378,000 result in denials. These denials, together with other benefit determinations, result in approximately 2.5 million appealable decisions annually at the regional level.[10]

In FY '78, about 66,000 of these decisions were contested. Twenty-five percent of these contests were withdrawn or dropped. Roughly 15% prevailed on reconsideration at the local level. The remainder—36,000 in FY '78—went to the Board of Veterans Appeals (BVA), the first and final appeal stage .

The vast majority of contested cases involve the presence of disability, the degree of disability or relation of a disability to military service. Success on these issues depends heavily on gathering and presenting medical evidence. Data assembled in prior studies and within the Veterans Administration indicate that success rates increase at both the BVA and local level when there is representation by a trained advocate.[11] Although free representation (primarily from veterans service organizations) is available, a significant number of claimants are not represented at either the local or BVA level. While the great need for advocacy in VA compensation and pension claims in apparent,[12] it is not necessarily a need for lawyer representation. Except for a very limited number of cases, the Veterans Administration is

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[10] A more detailed schematic of the administrative structure and what occurs at various levels is presented in Appendix A-1.

[11] See Appendix A-1 at 30-32

[12] Any income maintenance system the size of that run by the VA also spawns claims about the method of administration. See, e.g., *Seva* v. *Roudebush*, 442 F. Supp. 153 (D.N.M. 1977) (representative payee procedures); *Plato* v. *Roudebush*, 397 F. Supp. 1295 (D. Md. 1975) (termination procedures); *Hester* v. *Melidosian*, 261 F. Supp. 659 (E.D. Pa. 1966) (veteran's access to his VA file).

caseload. Over 7,000 "regular program" review cases were docketed in FY '78. It seems likely that caseloads will remain relatively high through 1980, because of the suspension of the statute of limitations.

The available information on the Discharge Review Boards shows both that relief is available for significant numbers of veterans and that effective representation is necessary to maximize success. The overall success rate before the Boards was approximately 50% in FY '78—nearly 15,000 discharges were upgraded. The chance of success improves markedly when the veteran personally appeals before the Boards, a step most veterans are probably unwilling to take without representation. A survey by the Army Discharge Review Board shows that representation increases the success rate and that attorney or attorney-supervised representation increases the success rate by 60% over pro se appearance.[31] Also, the actions of the Discharge Review Boards are subject to judicial review, so counsel may be necessary for preparation of a proper record for presentation to a court.

Given the significant chance of success in the Discharge Review Boards and the effect of representation, discharge review is a significant area of legal need for veterans. Moreover, only a small percentage of the veterans who could benefit from discharge review are pursuing their remedies in this area. Given

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[31] Personal opinions may vary from the survey results. The Army Discharge Review Board is the most affirmative on the need for counsel. The Air Force Board felt the presence of counsel makes a difference in only a small number of cases but supported representation as support for the veteran. The Navy Board believes representation to be irrelevant. See Appendix A-1 at 19-20.

service provided to veterans by legal services programs. Although all of the possibilities listed drew some response, 68% of the respondents answering the question found program services to be "poor" or "fair."

The perceptions on quality, expertise and willingness to provide services must be viewed in light of the actual experiences reported by the respondents. Less than half had actually referred cases to a local legal services program.[76] Those that had made referrals viewed the results as follows: favorable results (20%, 8 responses); mixed or "neutral" results (36%, 15 responses); unfavorable results (44%, 18 responses).[77] Eighty-nine percent of those responding to this question, (100 responses) stated the local legal services program had engaged in veterans.[78]

The questionnaire asked respondents whether, in general, there was a need for legal services for veterans. The respondents overwhelmingly felt such a need exists; 85% (96 responses) felt it exists for those who can afford legal services; 88% (98 responses) felt it exists for those who cannot afford legal services.[79]

Finally, the respondents were asked to state whether they

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[76] See Data Book Table I.30.

[77] See Data Book Table I.31.

[78] See Data Book Table I.34.

[79] See Data Book Table I.27 and Table I.28.

> discernible adverse party and no opportunity for judicial review. Or, on the other hand, he can retain a service representative who has virtually unlimited access to data and absolute freedom to initiate *ex parte* contact with the decision-makers.[87]

Given the informality of the system and the availability of *ex parte* contacts, there is a premium on personal relations with decision-makers and knowledge of the system. It is clear from all our interviews that service organization representatives have such relations and knowledge—they are, in essence, an integral part of the system. It appears clear that, at the regional level, advocacy based on these informal contacts can be very effective.

Even at the local level, however, there are reasons to question whether traditional service organizations adequately fill the need. Even with the massive staff and large number of volunteers devoted to advocacy, caseloads are fairly high. A significant number of veterans choose to go without the free and available assistance. Many service organizations do not provide the training and support to their regional operations that are desirable for effective representation. The closeness to the system appears to result in an allegiance that may at times be inconsistent with zealous advocacy in more controversial types of cases, especially those concerned with particular issues involving Vietnam era veterans (for example, psychological service-connected impairments or medical effects of use of defoliants), minorities, dependents and women.[88] Finally, the reliance on informal methods may not result in the type of local record

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[87]Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veteran's Benefits: A Preliminary Analysis*, 27 Stanford L. Rev. 905, 915 (1975).

[88]Two factors appear to be at work. One is a sort of system allegiance that appears to infect any advocate doing the same work in a supportive environment over a period of time. See Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veteran's Benefits: A Preliminary Analysis*, 27 Stanford L. Rev. 905, 919 (1975). Another is a different model of representation from that of a lawyer that accepts some freedom to have an independent position from that of the claimant.

that is necessary for success at the appellate level should the local decision be adverse.

At the national level, advocacy is delivered in line with a more traditional model. There is much more variation in the views of the quality of representation at this level. The Chairman of the Board of Veterans Appeals, for example, characterized the quality of representation as running the gamut from good to bad (on a scale of 0 to 10, an average of 5) stressing the need for good training and experienced advocates.[89]

There appear to be two main reasons for the variation in quality. First, the increased formality encountered at the BVA puts a higher premium on case preparation, evidence presentation, oral advocacy and written advocacy than is present at the local level. Thus, not surprisingly, the available data appear to indicate that attorneys have a higher success rate than do service organization representatives in the BVA.[90]

Second, the caseloads of the national level staff appear to be crushing-about 5 cases to present per working day. It is difficult to conceive how effective representation can be provided for that number of cases.[91]

We found a similar assessment of quality before the Department of Defense boards. For example, spokespersons for both the Army and Navy Boards for Correction of Military Records favored trained attorneys over service representatives. (The Air Force Board spokesperson rated them equally). In the Discharge Review Boards, the Army spokesperson stated:

> There can be no denying the advantage of having a trained and experienced representative presenting your case—that is, a person able to understand the value of using the index and who is familiar with regu-

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[89]See Appendix A-1 at 21-22.

[90]See Appendix A-1 at 31-32.

[91]While new evidence can be offered at the BVA level, the service organizations appear to rely generally on the record developed in the region. In part, this explains the caseloads. It also raises questions about overall effectiveness, since the regional record was developed in an informal atmosphere of personal contact.

latory and legal procedures in administrative processes. At times it is apparent that the presentation of cases by lesser experienced counsel is adversely affected by their perception of what the applicant deserved as a result of service. One assumes that a lawyer would rise above that ... [the] absence of uniform excellence in representation ... is only correctable by drawing of trained and experienced counsel from a similar source.[92]

The Air Force representative felt expert counsel made a difference in only a few cases; the Navy representative found all representation irrelevant.[93]

The Army Discharge Review Board conducted a study of success rates by type of representation in cases coming from the Atlantic region. That study found that, based on 595 cases presented, persons represented by private counsel had the highest success rate—over 72.%[94]

The service organizations appear to be handling fewer discharge review cases in relation to the need than is the case with their VA work. In part, this quantity gap may be an unavoidable result of the heavy regional staffing allocations for VA work. Most discharge review hearings are held in Washington. The Boards for Correction of Military Records never have hearings outside of Washington.

In summary, our assessment of the traditional service organizations (based on the available studies and our interviews) is as follows:

1. The service organizations provide advocacy in a tremendous quantity of cases.
2. That advocacy is most effective where adjudication is informal—for example, at the local level in the Veterans Administration.
3. In the more formal adjudications, the advocacy skills of a lawyer result in a higher success rate than can be obtained by service organizations.
4. The service organizations are a substantially more effective resource for VA claims than for discharge

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[92]See Appendix A-1 at 19-20.

[93]See Appendix A-1 at 20.

[94]See Appendix A-3 at 56.

is limited to a total of $10.00[97] This anachronistic provision arose out of a desire in 1892 to protect the veteran. Obviously, it eliminates all fee for service work before the Veterans Administration. As a result, there is almost no private attorney representation provided to veterans with respect to veterans claims.

The fee limit does not apply to representation before the DOD Boards. Even before these Boards, lawyers are appearing in a relatively small number of cases. For example, in the Army Discharge Review Board study of cases in the Atlantic region, only 12% of the cases involved private attorneys.[98]

E. Barriers to Legal Services Program Involvement in Veterans Advocacy

While the major research mandate to the Corporation was to determine the special access to legal services barriers faced by veterans, the issue is better charazcterized as one of barriers preventing legal services from reaching veterans. The barriers appear to fall in three categories:

1. For a variety of reasons, eligible veterans are encouraged to use the advocacy resources of traditional service organizations and veterans counseling groups. Rarely are they referred to a legal services program.
2. Only a certain amount of legal representation can be provided locally. Legal services programs do not have the financial resources or the time to provide representation in Washington, D.C.
3. The rules on representation before the Veterans Administration create an impediment to the general use of paralegals for representation.

The first barrier involves a form of "tracking". The traditional service organizations unanimously believe that legal services programs should not be doing significant amounts of veterans representation, at least on VA claims, and do not refer their members to local programs. The same appears to be true of VA staff. This attitude is reinforced by

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[97]38 U.S.C. § 3404(c).

[98]See Appendix A-3.

Veterans Administration application and notice of decision forms that are written in a way to discourage seeking lawyer representation.[99] The Discharge Review Board forms also appear to encourage veterans to go to service organizations.[100]

The second barrier is especially significant if, as we perceive, the greatest need, and the most appropriate involvement for legal services, is for physical presence in the more formal proceedings of the Board of Veterans Appeals and the Discharge Review Boards. The BVA has a limited schedule for sitting outside of Washington. In most cases, however, waiting for a traveling panel will significantly delay resolution of the case and still may involve a considerable trip to the city where the panel sits.[101]

The Discharge Review Boards offer better access to the adjudication process.[102] Both the Army and Navy Boards have regular traveling panels; both use a service radius concept (that is, a person need only go a certain number of miles to a hearing). The Army uses the narrowest service radius—200 miles—and has the highest rate of personal appearances. The Air Force Board travels little and has by far the lowest rate of personal appearances. The Army will in special cases videotape a hearing in the veteran's home town or city to be played back as evidence before the Board. Even with the traveling panels, however, there is a perception of delay and limited access that causes many persons to submit cases on the record that they feel should be presented orally.[103]

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[99]See Appendix A-5 and Popkin, *The Effect of Representation in Non-Adversary Proceedings—A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1010 (1977). The author sets out what he believes would be a more appropriate notice. *Id* at 1048.

[100]Appendix A-6.

[101]See Appendix A-1 at 14.

[102]See Appendix A-1 at 17-18.

[103]For example, the application form used by the Discharge Review Boards states that generally a Washington hearing will occur within six months and a hearing before a traveling panel will occur within twelve months. It further states that hearings involving counsel or other representatives are generally heard within three months but only if held in Washington. See Appendix A-6.

The Boards for the Correction of Military Records offer no access outside of Washington and have few evidentiary hearings.[104]

Because of the inability to reach adjudicators, it is not surprising that legal services programs would see little advantage in their services and not seek to encourage veterans service demands, especially in light of caseload pressures and the availability of other resources.

The third barrier is particularly important because of the structure of most legal services delivery systems. In general, programs have trained paralegals to provide representation, under attorney supervision, in administrative cases, especially those involving income maintenance benefits. Veterans Administration regulations prohibit legal services paralegals from providing representation except on an individual power-of-attorney basis. The VA has taken the position that legal services programs cannot be certified (as can traditional service organizations). The result appears to be at least a substantial administrative inconvenience for legal services programs, in that the power-of-attorney signed by the client will apply only to a named individual and not to the program generally.[105] Thus, a change in program personnel will require the execution of a new power-of-attorney, and an entry of appearance by a program attorney will automatically revoke the power of attorney granted to a paralegal, thereby eliminating the paralegal's access to the veteran's file.[106] Furthermore, in light of past experience, it is possible that the VA will take an even more stringent stance on the recognition it will grant on an "individual case" basis,[107] an examination to which "accred-

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[104]Appendix A-1 at 18.

[105]30 C.F.R. § 14.630 and 14.631. See comment to § 14.631 at 43 Fed Reg. 46534 (October 10, 1978).

[106]38 C.F.R. § 14.631(d).

[107]See letter from VA adjudication officer to Ron Bitzer, *VA Administrative Procedure and Judicial Review Act: Hearings on § 364 and Related Bills Before the Committee on Veterans' Affairs United States Senate* 95th Cong., 1st Sess. 191 (1977).

ited" representatives of "recognized" organizations are never subjected.

F. Veterans—Summary and Recommendations
1. Special Difficulties of Access

There is no evidence to suggest that veterans and their dependents have special access problems in getting to and being served by legal services programs. However, they rarely seek assistance from programs on veteran related problems (that is, legal problems related to veterans status). As a result, programs facing almost no demand from veterans and dependents on status-related cases have not placed a high priority on veterans problems, nor in general have they engaged in outreach and publicity targeted on improving and increasing service to veterans on these special legal problems.

Two factors appear to create the present situation. First, veterans and dependents are tracked to seek advocacy assistance from traditional veterans service organizations (for example, the American Legion) and veterans counseling groups by the Veterans Administration, the Department of Defense Boards, and by the outreach and publicity of the service organizations and counseling groups. Second, legal services programs, seeing almost no demand for service from veterans on status-related problems, are not aware of the need for legal advocacy.

One must distinguish in these findings between the need for legal services and the need for advocacy. Veterans service organizations provide a vast range off non-lawyer advocacy assistance on most status-related types of problems. In general, where this advocacy is directed at informal and discretionary decisions, for example, at the regional level within the Veterans Administration, it is helpful and effective. However, where it is directed at more formal adjudicatory mechanisms, for example, the Board of Veterans Appeals, it appears to be less effective and is less well received by the decision-makers. Also, it is most effective in the Veterans Administration area, that is, with programs administered by the Veterans Administration, and less effective and in less quantity in military discharge upgrading problems.

There are a number of additional factors at work. First, veterans law consists of a large and relatively complicated body of statutes and regulations that is overwhelming to legal services staff not required to deal with it regularly. This means that even if the major access barriers are broken down and demand for service increases, local program staff do not presently possess sufficient expertise to assure delivery of quality legal services to veterans on status-related problems. Second, many cases require legal advocacy before adjudicatory boards in Washington; legal services programs do not have the resources to handle Washington cases. Third, some formal rules in the Veterans Administration, on representation, access to facilities and the like, inhibit representation by legal services programs and are part of the problem. All these factors deter programs from doing significant work for veterans and dependents on status-related cases, particularly in those cases requiring work in the more formal adjudicatory hearings.

LEGAL SERVICES CORPORATION

MEMORANDUM
DATE: November 27, 1978
TO: John Dooley
FROM: Frank Kochman
SUBJECT: Investigation into the Present State of Special Legal Representation of Veterans

I. SCOPE AND METHOD

The investigation consisted of interviews with key persons in three major categories: 1) spokesmen for the traditional veterans service organizations; 2) spokesmen for the Veterans Administration; and 3) spokesmen for those military boards before which veterans commonly appear to seek discharge upgrades and correction of records. Great reliance was placed on the statistics and informed opinion supplied by the interview subjects. No attempt was made to develop independent information. A complete list of the persons and organizations interviewed is attached. The investigation was Washington-based. No attempt was made to glean information directly from regional locations. For regional figures, reliance was placed on an unpublished study by William D., Popkin, submitted to the Administrative Conference of the United States in 1975. Where reliance is placed on this source, the figures should be viewed with caution because of the small sample size. In some instances, more certain regional data was supplied by the Board of Veterans Appeals.

II. PURPOSE

The purpose of the investigation was to aid the Corporation in resolving the Veterans issues presented in "Section 1007 (h) Issues

and may be contested.

If a claimant wishes to contest a decision, he must file a "Notice of Disagreement" (NOD) within 1 year of the decision. He or she may then request a paper reconsideration or a personal hearing,[5] or both, at the regional level. If the claimant takes no action to follow up on the NOD (which is frequently the case), the file is closed. If the claimant follows up with a request for reconsideration or hearing, but obtains no relief, he or she may then file a notice of appeal, and the case is certified to the Board of Veterans Appeals.

The Board of Veterans Appeals (BVA) is theoretically an independent body within the Administration. The adjudicatory arm of the BVA consists of 48 members (15 doctors, 33 lawyers) who function in 16 3-member "sections" with the support of 107 staff attorneys. There is a "Medical Advisory" group consisting of four members—an internist, a cardiologist, a surgeon, and a psychiatrist. The Board as a whole is under the direction of a Chairman.

An appellant may request a personal hearing before the Board as a matter of right. In most cases however, he or she must bear the expense of a trip to Washington to exercise this right. As a result, personal hearings are held in only 5% of the cases. The typical case is decided on the basis of the written record as transmitted by the regional office, accompanied by a statement of the position of the veteran. In the majority of cases where the veteran is represented by a veterans' service organization, the veteran's position is typically stated in a one-page handwritten statement of contentions (without argument). The Board does have the discretion to seek medical opinions from its own medical advisory group or to order independent outside medical evaluation. As it does in more than 13% of cases, the Board may also remand a case for further development at the regional level if it is not satisfied that the record has been properly developed in the first instance.

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[5] At a hearing, the claimant is not afforded a right of cross-examination, and the subpoena power is granted to the VA by Congress is, as a matter of policy, never employed.

A decision by the board is a "final decision" within the special meaning that term has in the context of veteran's claims, i.e., it does not carry the usual connotation that the claim is ripe for judicial review, since there is no provision for judicial review of veterans claims. On the other hand, the principle of *res judicata* is not used. A claim may be reopened at any time on an allegation of new evidence, and theoretically will be given full consideration.

In general, veterans benefits are not available to those who received discharges under less than honorable conditions. Furthermore, although a "general discharge under honorable conditions" will qualify a veteran for most VA benefits, the absence of a fully honorable discharge is viewed with suspicion in the competitive world of civilian employment. For these reasons, an important concern of many veterans is the availability of forums and skilled representation for challenging the character of a discharge.

Three avenues exist for challenging the character of a discharge. First, a veteran may seek discharge review as an incident to a claim for VA benefits under the procedure described above. The other two channels exist within the Department of Defense and are described below.

Discharge Review Boards. All of the armed services maintain such boards, which are staffed by field grade officers (0-4—0-6). They are constituted pursuant to 10 U.S.C. Section 1553 for the purpose of reviewing the "propriety and equity" of a discharge from service. Normally, review before these boards is subject to a 15 year statute of limitations[6], running from date of discharge. The boards have no jurisdiction to review discharges issued pursuant to a general court martial.

The Boards have authority to review discharges on their own motion, but the usual procedure is initiated by an applicant. The Boards do not purport to assist the applicant in gathering evidence to support the claim. On the other hand, there are no fee restrictions for lawyers. The service organizations recognized by the VA are also recognized by these boards.

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[6] PL 95-126 has temporarily suspended the statute of limitations Act of the October 8, 1977, in some cases.

An applicant has the right to have his case reviewed in purely documentary form, to appear personally for a hearing with or without a representative or to appear through a representative alone. For the past few years, all of the Boards have maintained traveling panels, easing the problem of access somewhat, with a resulting increase in the number of personal appearances.

An applicant may have a documentary review followed by a personal hearing if he so chooses. However, once he or she has exhausted the option of a personal hearing, the standard for reopening a claim is framed in terms approaching a judicial standard, i.e., new evidence must exist and be shown to have been unavailable at the time of the initial review. An applicant dissatisfied with the decision of a discharge review board may take his or her case to a board for the correction of military or naval records.

Boards for Correction of Military (Naval) Records. These are civilian boards whose members serve part-time while holding other positions under the Secretaries of the respective Services. The Boards have broad authority to change any entry in a military record on grounds of prior error or inequity. (In some cases the board's decision is a recommendation to the appropriate Secretary.) In addition to handling a wide variety of matters pertaining to servicemen on active duty, the Boards have original jurisdiction to review discharges issued pursuant to general court martial and discharges outside the 15 year statute of limitations applicable to the review boards. The Boards have appellate jurisdiction over review board decisions. Personal hearings are not given as a matter of right, but are convened at the discretion of the Boards. They are rare. The Boards do not travel, sitting only in Washington, D.C. Judicial review of Board decisions is available under the APA.

All of the adjudicatory bodies discussed above are, in principle, non-adversarial in concept and procedure. They tend to view themselves as courts of mercy, righting injustice and dispensing grace where a former miscreant has demonstrated a capacity to adjust to society. This view is most forcefully advanced by the Director of the Naval Council of Personnel Boards—he argues that third-party representation is largely irrelevant because of the nature of the process. No other spokesman goes so far, and the over-

whelming weight of the evidence demonstrates that third-party representation does in fact make a substantial difference in favor of the applicant. Nevertheless, the concept of grace permeates the system and tends to have an impact for both good and ill on the unique system of third-party representation that has evolved.

Congress has by statute recognized specific private organizations for the purpose of representing veterans before the VA and has granted authority to the Administrator to recognize others. The VA is authorized to provide free office space for these organizations in Washington and at regional locations. Although 26 organizations are so recognized, four dominate the field: The American Legion, Veterans of Foreign Wars American Red Cross, and Disabled American Veterans. In general, individual representatives affiliated with these organizations are non-lawyers with no particular prior training or experience. The quality and intensity of the training provided to the representatives by their organizations varies widely. The accredited representatives of these organizations fall into three classes—those who are paid professional staff of the accrediting organization, those who are paid by decentralized local branches or State departments of veterans affairs, and those who are volunteers.[7] Roughly 750 (25%) appear to be paid staff of the accrediting organizations. The remaining accreditations are paper transactions. The organizations seem to maintain little or no data on the activities and qualifications of non-staff representatives; nor do they assume training responsibility for these persons.

All of the major organizations are dues-paying organizations with members in about 30,000 local posts, chapters, or branches throughout the country. By statute, membership in an organization may not be made a condition of that organization's willingness to represent a veteran who requests assistance. The organizations have discretion to decline a case, although they all indicate they do not decide this on membership status.[8] Each local post or chapter is

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[7] Disabled American Veterans accredits only its full-time paid staff.

[8] "Although representation is free and service organizations do not insist on membership in exchange, the handling of veterans claims by these organizations is a major point in recruiting new members. Veterans will often feel a "moral" obligation to join the service organization which helps them."—Popkin at Ch. 9, P. 7.

presumed to have a "service representative" who should understand the rudiments of processing a claim or should at least be able to refer an applicant to an accredited representative.

The major organizations generally have offices at the VA regional offices and in Washington at the seat of the BVA and the Pentagon. The organization spokesmen stress the value of their proximity to the operational centers and the resulting "working relationships" with the decision-makers. There is some evidence to suggest this "working relationship" can be a two-edged sword. Individual representatives sometimes tend to see themselves as preliminary adjudicators rather than as advocates and will permit their personal view of the validity of a claim to color the manner in which the claim is represented. To the extent that this is the case, the root of the confusion may well be the lack of judicial review, which is seen by a VA spokesman[9] as having a strong tendency to support the notion of Veterans benefits as "gratuities" for the "deserving" rather than rights for the entitled. It must be stressed, however, that all organizational spokesmen insist that as a matter of policy every applicant is given the best argument his case can support.

The remainder of this paper will discuss and summarize data bearing on the value of representation in general, and the accessibility of quality representation for veterans under the current system.

IV. DISCUSSION OF DATA

A. Veterans Administration

The 58 VA regional offices make approximately 2,500,000 "appealable decisions" annually in 15 major categories. Of these categories, the most significant in terms of appellate activity and importance to the veteran or his survivors are compensation and pension cases. "Compensation" claims are based on death or disability resulting from a service

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[9] Dean Phillips, Special Assistant to General Counsel, Veterans Administration.

event. "Pension" claims are based on need resulting from disability or death of a veteran. (They are mutually exclusive.) At least 80% of the cases decided by the Board of Veterans Appeals fall in these categories.

About 800,000 compensation and pension cases are decided annually at the regional level. Of these, 378,000 are denials.

Of the 2.5 million appealable decisions made at the regional level, in FY 1978 about 66,000 (2.1%) were contested in the form of a "Notice of Disagreement" (NOD) filed with the Region. Of these, about 10,000 were allowed on reconsideration by the Rating Boards, about 5,000 were formally withdrawn by the veteran, about 13,000 files were closed for lack of follow-up by the veteran, and about 36,000 were certified to the Board of Veterans Appeals. Of the 34,000 cases decided by the BVA in FY 1978, 12.5% resulted in reversals of the rating board decision and 13.4% resulted in remands for further development of the record. Thus, in 25.9% of the cases decided by the BVA, it was determined that the regional process (including reconsideration) was deficient in some respect. In compensation and pension cases (according to the Popkin study) representation by attornneys and minor service organizations approaches zero at the regional level. Forty percent of the claimants are unrepresented. Of these, 55%-58% are successful (rate varies according to the criteria used to determine a "win".) About 16% of the claimants are represented by State government organizations, with a success rate of 50-51%. Forty-five percent of the claimants are represented by one of the four major veterans service organizations. Considered as a group, these organizations have a success rate of 61%-67%[10]

According to data provided by the Board itself, unrepresented claimants who appeal to the BVA have an allowance rate of 10.67% and an "ultimate success" rate of 15.2% (combination of claims allowed by the board and an approximation of claims allowed in the field after remand by the board). No statistics were available for the number of claims allowed by the board on review after remand.

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[10] Derived from Popkin at Chapter 9, p. 27

Claimants represented before the Board by a service organization have an allowance rate that ranges from 11.93% to 14.15%, depending on the organization, and an "ultimate success" rate that ranges from 15.8% to 16.8%.

Claimants represented by an attorney or claims agent have an allowance rate of 13.56% and an "ultimate success" rate of 18.3%.

At the VA Regional level, two types of hearings are held. These are a) "pre-determination hearings", which take place on request of the veteran, generally after he has been informally advised through counsel that the rating board is inclined to deny his claim; and b) "Post-determination" hearings, which take place on request of the veteran after a Notice of Disagreement is filed pursuant to a formal negative decision by the rating board. The special one-month study conducted by the VA at the request of the Senate Committee on Veterans Affairs shows a success rate of 27.3% in pre-determination hearings, and a 21.1% success rate in post-determination hearings.[11] These figures contrast with an overall success rate of 15.8% for cases reconsidered by the rating boards after Notice of Disagreement

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[11] The Chairman of the BVA accounts for the higher success rate in predetermination hearings on the grounds that it is "human nature" to stick by a decision that has been made. Jeffrey Glosser, a Washington attorney with substantial experience before the boards for correction of military records, concurs emphatically in this view and takes it further: He states that, despite the veteran's right to reopen his case an indefinite number of times on allegations of new evidence, in a psychological sense "you really only have one viable bite at the apple." (Mr. Glosser is former chairman, Military Law Committee, Section of Administrative Law, ABA; former chairman, Veterans Committee, Section of Administrative Law ABA; and former chairman, Military Law Committee, Bar Association of Washington, D.C.) These views tend to underscore the tactical importance of maximizing case development and hearing opportunities in the first instance. The point in the VA claims process where a decision is imminent seems to be a particularly crucial point for the intervention and advice of informed counsel. The success rate at predetermination hearings (27.3%) is very close to the combined reversal/remand rate at the Board level (25.9%). One might speculate that, if personal hearings were held as a matter of course prior to decision, the rating board error rate would approach zero.

(BVA FY 1978). The Board of Veterans Appeals does not maintain separate success statistics for personal appearances. Of more than 34,000 cases decided by the BVA in FY 1978, only 1,452 involved personal appearance. Of these, 947 hearings were held in Washington, D.C., and 505 were held before traveling sections in regional offices. Although the BVA traveling program offers some relief from the hardship of appearing in Washington for a personal hearing, it is not adequate to meet the demand. It also is limited to areas served and involves considerable delay. For instance, the Chairman reports that the Board "tries to make one trip a year to a number of locations in California", but cannot meet the pending caseload on these trips. The result is that a California applicant who is far down the list of pending cases must choose among going to Washington waiting 2 years for a traveling section, or setti ng for a paper review.

Of roughly 800,000 compensation and pension cases decided in FY 1978 at the regional level, about 54% were nonoriginal claims, which includes claims for increased disability ratings and claims previously denied but reopened on an allegation of new evidence.

Of claims certified to the Board of Veterans Appeals in FY 1978, 13.4% were remanded for further development. The chairman of the BVA has shown special concern for the remand problem and has lectured frequently on the need for thorough case development. He feels that his emphasis on this problem has borne fruit, in that the remand rate has diminished gradually since his assumption of office in 1974. Nevertheless, the BVA remand rate suggests the tip of an iceberg, since the number of cases certified to the Board is such a small percentage of the number of "appealable decisions". Presumably, inadequate development at the regional level creates dissatisfied clients who shop for new representation and re-open claims at the regional level without bothering to appeal, thus adding substantially to the overall caseload.

The Director of Compensation and Pension Service and the Chairman of BVA agree that everyone should have a right to choose his own representative, and that this is precluded by the fee limitation. The Director of Compensation and Pension Services feels that Legal Services involvement

is a "good idea so long as it does not destroy what's been built up with the veterans organizations." The Chairman of the BVA feels that Legal Services participation would be "very valuable" at the appellate level, but that no formal representation of any kind is needed at the regional level. He asserts that although there is room for improvement in the development of claims (witness the remand rate), the problem is easing as a result of the emphasis he has placed upon it. He feels that competent development can be done by the veteran himself, the "veterans benefit counselors" employed by the VA and by State or county-employed veterans counselors.

On the issue of judicial review, the official position of the Administrator supports the concept.[12]

B. Boards within the Department of Defense

Historically, a small percentage of those eligible to do so have applied for relief to the Discharge Review Boards. Since the inception of the Naval board in 1944, 10% of those eligible for review of discharge have applied. For the Army, prior to 1973, 17% of those eligible have applied within 5 years of discharge, with the percentage dropping sharply to about 2.5% at the end of the 15 year statutory period. Since 1973, 33-40% of those eligible have applied within 3 years of discharge, with the rate of application then dropping sharply to virtually nothing.

The Navy spokesman attributes the low rate of application to a conviction on the part of the discharged serviceman that he got what he deserved. The Army spokesman agrees that this is one factor to account for the historically low rate of application, but feels that it is an insignificant factor compared to the following: a) shame b) the veteran perceives no need for VA benefits c) the veteran remains employed at such a low level in the economy that the character of his discharge never becomes relevant d) the veteran is self-employed e) the veteran's family has sufficient

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[12] See letter to Hon. Alan Cranston, Chairman, Committee on Veterans Affairs, U.S. Senate from Max Cleland, Administrator of Veterans Affairs of October 7, 1977.

influence in his hometown to neutralize the stigma of the discharge.

A look at statistics bearing on personal appearances, accessibility of the boards, representation and success rates tends to show the same relationships that exist within the Veterans Administration.

The Air Force Discharge Review Board, with a sporadic travel program, has a 21.1% rate of personal appearance. In the last fiscal year, 39 personal hearings were held in Washington and 185 were held in the field.

The Army Discharge Review Board and the Naval Discharge Review Board both have systematic, fairly intensive travelling programs that provide an interesting contrast. Both boards have a number of panels on the road at all times. The Navy panels use a 300 mile service radius; the army panels use a 200 mile service radius. The Army has a 54.6% personal appearance rate, while the Navy has a 45% rate. It would seem that one could almost calculate the increment in personal appearances on a per-mile-of-travel basis.

Before the boards of discharge review, the comparison between success rates for applicants who make personal appearances and those who do not shows a correlation between personal appearance and success. For the Army, the comparative figures are 55.5% and 42.6%; for the Navy, 39% and 30%; for the Air Force, 81% and 58%.

The respective Boards for Correction of Military Records keep no statistics in this area. Personal appearances are a matter of discretion with the boards, and a very small fraction of cases are decided on this basis. Those that are show a high success rate.

The overwhelming majority of those applicants who have personal hearings appear with a representative, and presumably upon the advice of the representative.

Among the spokesmen for the boards of discharge review of the three principal armed services, opinion was divided on the value of counsel generally and also on the value of lawyer counsel. There was a consensus for the proposition that lawyer counsel who did not specialize in the field were not useful. All spokesmen projected a distaste for lawyers who come to a hearing with an armory of litigation techniques but without knowledge of the substantive law.

There was also consensus on the seriousness with which the Boards take their duty to "do equity" in a non-adversarial context, and the earnestness of Board members in aiding an inarticulate applicant to present his case. Beyond these points of agreement, opinion diverged as follows:

Navy: (including Marines): Counsel of any kind is irrelevant. The officers of the Board have a mandate from the Secretary of the Navy to conduct hearings under the standards and within the parameters specified in SECNAVINST 5420.174A (30 March 1977). They adhere faithfully to their mandate, which assures that the applicant will receive relief if the record supports his request. No claim of perfect justice is made, but such errors as do occur are not the result of a lack of effective counsel. Large scale involvement of Legal Services would be a waste of public money.

Air Force: The number of cases in which expert counsel does or could make a difference is very small. However, "even the worst counsel serves a purpose", because many applicants are afraid and need at least moral support. It would be ideal if every case could be a personal appearance with counsel of some sort, but on a cost/benefit basis there is a serious question whether the systematic involvement of Legal Service is warranted.

Army: This board decides the overwhelming majority of discharge review cases (77%). The President of the Board is also the administrative focal point for the Department of Defense in the area of discharge review. On the issue of counsel, he states: "There can be no denying the advantage of having a trained and experienced representative presenting your case—that is, a person able to understand the value of using the index and who is familiar with regulatory and legal procedures in administrative processes. At times it is apparent that the presentation of cases by lesser experienced counsel is adversely affected by their perception of what the applicant deserved as a result of service. One assumes that a lawyer would rise above that." The "absence of uniform excellence in representation . . . is only correctable by drawing of trained and experienced counsel from a similar source."

Among the spokesmen for the boards of correction of military Records of the principal services, opinion was divided on the need for lawyer counsel. *The Air Force Spokesman*

felt that the veteran's service organizations do "just as good a job" as private counsel, and that while the involvement of Legal Services might help the applicant class in the sense that more representatives would be available, there is no reason to prefer lawyers over non-lawyers. *The Army spokesman* felt while some of the veteran's service organization representatives are more knowledgeable than some of the private attorneys, those private attorneys who specialize in military personnel law do "a tremendous job". He is in favor of a trained corps of attorneys with the necessary expertise. *The Navy Spokesman* felt that representation by an attorney with the necessary expertise improves an applicant's chance of success by "hundreds of percentages". He feels it would be "useful for a trained body of representatives to be involved". He does note that the DAV has "raised the level of professionalism" among the veteran's service organizations and confirms that the DAV representative "gets training that nobody else gets". However, even for the DAV, a typical presentation involves a one page handwritten "brief". He states that the polished briefs submitted by private practice specialists tend to have weight with his Board.

C. Veterans Service Organization

The quality of representation provided by the veterans service organizations is perceived as of uneven quality by the tribunals before which the service representatives practice. Characterizations of the quality of representation run a range from "excellent" to "irrelevant" to "counterproductive to the interests of the veteran". These characterizations describe individuals rather than organizations. All boards were either unable or unwilling to characterize the performance of any particular organization as either less than competent or uniformly superior. In general, those held in highest regard seemed to be Red Cross, DAV, and the departments of veterans affairs of several States. The Chairman of the BVA comments: "On a scale of zero to 10, the quality of representation runs from zero to 10, with the average being about 5. Some service organizations have good training programs and bring guys to Washington who really get the job done. This is what they all need. Others have less valuable training programs." The

spokesman for the air Force Board for the Correction of Military Records states that the service organizations do "just as good a job as private counsel." The spokesman for the Board for the Correction of Naval Records states that the DAV "has raised the level of professionalism among the service organizations", and that the DAV representatives "get training that nobody else gets." However, he notes, even for the DAV a typical presentation involves a "one-page handwritten 'brief' ".

It must be stressed that the "one-page handwritten brief" is standard practice among the service organizations, and that this practice appears on its face to be less than optimum representation in view of the factors that the various boards are willing to weigh in the applicant's behalf. For instance, the Air Force Discharge Review Board publishes a "Guidance Sheet"[13] which advises the applicant of the types of evidence it would like to see. In addition to listing evidence pertinent to particular types of discharge, the Guidance Sheet suggests the following for any type of discharge: "Your statement on what happened that caused your discharge, what motivated you. Current police record (statement from local police department). Statement from schools and colleges ... Employment record. Participation in civic or community affairs. Character references ..."

COMBINED REVERSAL/REMAND RATE
BY MODE OF REPRESENTATION BY BVA

American Legion	25.08%
American Red Cross	25.26%
Disabled American Veterans	25.80%
Veterans of Foreign Wars	25.88%
Other non-Attorney	25.54%
No Representation	26.97%
Attorney/Agent	30.93%

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[13] Department of the Air Force, Air Force Regulation 20-10 at page 11.

ULTIMATE SUCCESS RATES*
BEFORE THE BOARD OF VETERANS
APPEALS BY MODE OF REPRESENTATION

American Legion	16.2%
American Red Cross	16.8%
Disabled American Veterans	16.6%
Veterans of Foreign Wars	16.7%
Other non-attorney	15.8%
No representation	15.2%
Attorney/Agent	18.3%

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*Calculated by adding to the number of claims allowed by the Board, the number of claims allowed in the field after remand by the Board, the latter figure being in turn derived by multiplying the number of remands by the overall rate of allowance after remand (27.9%). There is no way to determine whether the rate of allowance after remand varies depending on the mode of transportation.

70-123

A-56

ATLANTIC REGIONAL ARMY DRB STATISTICS
STATIC & TRAVELING PANELS
1 NOVEMBER 1975 - 1 JUNE 1978

TYPE OF COUNSEL	APPEARANCES (# CASES)	UPGRADES	UPGRADE RATE	UPGRADES TO HONORABLE	UPGRADE RATE TO HONORABLE
Civilian Attorney	44	32	72.73	6	18.75
Southern Center for Military & Veterans' Rights	120	80	66.67	33	41.25
Service Organizations	263	127	48.28	20	15.75
No Counsel	246	102	41.46	17	16.67
TOTAL	595	285	47.89	52	18.25

NOTES: Includes SDRP rehearings June, 1978 for SCMVR only (7 cases, 7 affirms). Totals do not add up due to SCMVR cases masked under other categories. Name change in 1976 is source of confusion.

SOURCE: Letter ADRB to SCMVR, 5 June 1978 and SCMVR computer survey of caseload.

VETERANS ADMINISTRATION

VETERAN'S APPLICATION FOR COMPENSATION OR PENSION

IMPORTANT: *Read attached General and Specific instructions before filling in this form. Type, print or write plainly.*

(DO NOT WRITE IN THIS SPACE
VA DATE STAMP

1782

970

1a FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN

1b TELEPHONE NO. (Area code - Number)

2 MAILING ADDRESS OF VETERAN (Number and street or rural route - City or P.O. - State and ZIP Code)

3a VETERAN'S SOCIAL SECURITY NO.

3b SPOUSE'S SOC. SECURITY NO.

4 DATE OF BIRTH

5 PLACE OF BIRTH

6 SEX

7 RAILROAD RETIREMENT NO.

8 HAVE YOU EVER FILED A CLAIM FOR COMPENSATION OR PENSION WITH THE OFFICE OF ANOTHER COMPENSATION PROGRAM (Examples: Employees' Compensation, U.S. Bureau of Employees' Compensation, Federal Employees' Compensation Act)

☐ YES ☐ NO

8b VA FILE NUMBER

C-

8c VA OFFICE NAME AND LOCATION RECORDS WERE SENT

8d HAVE YOU PREVIOUSLY FILED A CLAIM FOR AND BEEN GRANTED BENEFITS WITH THE VETERANS ADMINISTRATION?

☐ NONE
☐ DEATH PENSION OR DIC
☐ MEDICAL CARE
☐ WAIVER OF VA PREMIUMS
☐ DISABILITY COMPENSATION OR PENSION
☐ VOCATIONAL REHABILITATION (Chapter 31)
☐ VETERANS EDUCATIONAL ASSISTANCE (Chapter 34)
☐ DEA CHILDREN OR DEPENDENTS EDUCATIONAL ASSIST (Chap 35)
☐ DENTAL OR OUTPATIENT TREATMENT
☐ OTHER (Specify)

SERVICE INFORMATION

NOTE. Enter complete information for each period of active duty including Reserve or National Guard status. Attach Form DD 214 or other separation papers for all periods of active duty to expedite processing of your claim. If you do NOT have your DD 214 or other separation papers check this box ☐.

9a ENTERED ACTIVE SERVICE		9b SERVICE NO	9c SEPARATED FROM ACTIVE SERVICE		9d GRADE, RANK OR RATING (Officer or enlisted) AT TIME OF SEPARATION
DATE	PLACE		DATE	PLACE	

10a HAVE YOU EVER BEEN A PRISONER OF WAR?

☐ YES ☐ NO (If "Yes," give date and name of camp)

10b NAME OF COUNTRY

10c DATES OF CONFINEMENT

11 IF YOU SERVED UNDER ANOTHER NAME, GIVE NAME AND AREA OR SUB UNIT OF YOUR SERVICE AND SERVICE NO.

12 IF RESERVIST OR NATIONAL GUARDSMAN GIVE BRANCH OF SERVICE AND PERIOD OF ACTIVE OR INACTIVE TRAINING DUTY DURING WHICH DISABILITY OCCURRED

13A ARE YOU NOW A MEMBER OF THE RESERVE FORCES OF THE ARMY, NAVY, AIR FORCE, MARINE CORPS, COAST GUARD OR NATIONAL GUARD?

☐ YES ☐ NO

13B BRANCH OF SERVICE

13C RESERVE STATUS

☐ ACTIVE
☐ INACTIVE ☐ RESERVE DRILL SALARY

14A ARE YOU NOW RECEIVING OR WILL YOU RECEIVE RETIREMENT OR RETAINER PAY FROM THE ARMED FORCES?

☐ YES ☐ NO (If "Yes," complete 14B, 14C and 14D.)

14B BRANCH OF SERVICE

14C MONTHLY AMOUNT

$

14D RETIRED STATUS

☐ PERMANENT ☐ TEMPORARY (Give date it is expected to stop)

15A. HAVE YOU EVER APPLIED FOR OR RECEIVED DISABILITY SEVERANCE PAY FROM THE ARMED FORCES?

☐ YES ☐ NO (If "Yes," complete 15B)

15B AMOUNT

$

16A HAVE YOU RECEIVED LUMP SUM READJUSTMENT PAY FROM THE ARMED FORCES

☐ YES ☐ NO (If "Yes," complete 16B)

16B AMOUNT

$

VA FORM FEB 1970 21-526

SUPERSEDES VA FORM 21-526 NOV 1969, WHICH WILL NOT BE USED

7C-129

(Detach and retain Instructions)

INSTRUCTIONS FOR COMPLETING APPLICATION FOR COMPENSATION OR PENSION

PRIVACY ACT INFORMATION - No allowance of compensation or pension may be granted unless this form is completed fully as required by existing law (38 U.S.C. Chapters 11 and 15). The information requested by this form is considered relevant and necessary to determine maximum benefits provided under law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

NOTE: PLEASE READ VERY CAREFULLY

A. GENERAL INSTRUCTIONS
DISABILITY COMPENSATION is paid for disability resulting from service in the armed forces. An additional amount of compensation may be payable for a spouse, child, and/or dependent parent when a veteran is entitled to compensation based on disability(ies) evaluated as 50 percent or more disabling. The additional benefit for a spouse is payable in a higher amount when he/she is a patient in a nursing home or so disabled as to require the regular aid and attendance of another person.

DISABILITY PENSION is paid for permanent and total disability not resulting from service in the armed forces. If the veteran is 65 years of age or older, permanent and total disability is presumed. Pension is paid only to veterans of wartime service, or, of service on or after June 27, 1950, and prior to February 1, 1955, or, during the period between August 5, 1964, and May 7, 1975. An additional amount of pension may be paid for a spouse and/or child up to a total of three such dependents.

If you need information about the meaning of any question, write the Veterans Administration Regional Office. If additional space is needed for any item, use Item 38, "Remarks," page 4.

B. REPRESENTATION - ORGANIZATIONS AND ATTORNEYS
You may be represented, without charge, by an accredited representative of a service organization recognized by the Administrator of Veterans Affairs. While you may also employ an attorney authorized to practice in the United States or its territories or possessions to assist in prosecuting your claim, it is not necessary to do so. Any attorney so employed may not legally charge any fee other than that allowed and paid by the Veterans Administration, and which is deducted from benefits otherwise payable to the claimant.

C. EVIDENCE - GENERAL
If you have not previously filed claim, attach a photostatic or certified true copy of all separation forms or discharges you received from the armed forces. If you are a pension applicant, 65 years of age or older, no medical evidence is necessary. However, if you are under age 65, or if you claim additional pension because of the need for regular aid and attendance (unless you are a patient in a nursing home), or, because you are housebound, a detailed medical statement should accompany your application. Submission of proof of birth will expedite processing of your claim.

D. REPORTING NET WORTH FOR PENSION FOR DISABILITY NOT RESULTING FROM SERVICE
NET WORTH - You cannot receive a pension if you have a sizeable net worth. Your net worth is the market value of your interest or rights in any kind of property except ordinary personal effects necessary for daily living such as automobile, clothing or furniture and the dwelling (single family unit) used as your principal residence. Therefore, all other assets must be reported so that we may determine whether your net worth prevents you from receiving pension benefits.

E. INCOME LIMITS AND RATES OR PENSION - Pension benefits are not payable to a single veteran whose income exceeds $3,770 or to a veteran having a dependent spouse or child whose income exceeds $5,070. The rate of pension paid to a veteran depends upon the amount of income and the number of dependents, according to a formula provided by law. An additional $165 is payable each month to those rated as being in need of regular aid and attendance or a patient in a nursing home and $61 payable each month to those permanently housebound but not in need of regular aid and attendance.

(1) A veteran in need of regular aid and attendance whose income exceeds the limits shown above by not more than $500 may receive a reduced aid and attendance allowance even though entitlement to basic pension benefits does not exist.

(2) All pension rates are increased by 25 percent for veterans 78 years of age or older.

F. REPORTING INCOME FOR PENSION CLAIM - There are certain types of income which may be excluded in determining the income countable for VA purposes upon which your rate of pension is based. However, you must report all income from any source; and we will exclude any income which does not count. It is very important that you identify the source of all income reported so that we may make the proper exclusions.

G. FAMILY UNUSUAL MEDICAL EXPENSES are amounts actually paid by you during the calendar year for unusual medical expenses for which you are not reimbursed by insurance or otherwise. You should report the total unreimbursed amount you paid for medical expenses for yourself or for relatives you are under an obligation to support. You may include premiums paid for health sickness or hospitalization insurance. In computing your income for pension purposes, the VA will deduct the amount you paid for medical expenses which exceeds 5 percent of your reportable annual income.

H. LAST ILLNESS AND BURIAL EXPENSES
Your countable income may be reduced by the amount of expenses of the last illness and burial of a spouse or child paid by you at any time prior to the end of the year following the year of death for which you were not reimbursed. Use Item 38, "Remarks," to report such expenses.

I. HOME MORTGAGE PREPAYMENTS
If you made prepayments after the death of your spouse and before the end of that year or during the following calendar year on your principal residence occupied by you and your spouse, we may reduce your countable income by the amount of the prepayment. Use Item 38, "Remarks," to report such payment.

(CONTINUED ON REVERSE)

(1964)
(972)

SPECIFIC INSTRUCTIONS

IMPORTANT: These instructions are numbered to correspond with the items on the application.

ITEMS 3A and 3B - The number entered in 3A, Veteran's Social Security Number, should be your own social security number. In Item 3B enter your spouse's social security number. These social security numbers are necessary for identification purposes.

ITEMS 14A to 14D inclusive - Retired Pay - A veteran may not receive full service retired pay and VA compensation or pension at the same time. In the absence of a request to the contrary, filing of this application will constitute an election to receive VA compensation or pension in lieu of the total amount of retired pay, or a waiver of that portion of retired pay equal in amount to the VA compensation or pension. No special action will be required of you, as we will notify the retired pay division of your waiver if entitlement to VA benefits is established.

ITEMS 15A and 15B - Disability Severance Pay - The full amount of disability severance pay received for the disability or disabilities for which VA compensation is payable will be recouped from that benefit.

ITEMS 16A and 16B - Lump Sum Readjustment Pay - Recoupment of 75 percent of readjustment pay you received will be made from any VA compensation payable.

ITEMS 17A to 21D inclusive - Marital Information - Complete information concerning all marriages entered into by either you or your spouse and the termination of such marriages must be furnished. Specific details as to the date, place and manner of dissolution of each marriage must be included.

ITEMS 32C and 33C - Months Worked - The time actually worked should be stated. For example: If you worked full time for 2, 4, 6, 8 or 10 months, you should so state. If you did not work full time each month you should state the months or parts of months you actually worked. For example: 2 months, 1 week, 2 days.

ITEMS 34A to 35E - If you have applied for social security, unemployment or workmen's compensation or any disability benefit, show the expected payment in the appropriate column. If the amount or date of payment is not yet determined, enter the word "unknown."

ITEM 36, Lines 1 to 14 inclusive - You should report under this item your expected total income for the periods covered. You must report total income of yourself and your spouse from all sources. When reporting income, report the total amount to which you are entitled before any deductions, not the amount you actually receive. Include as income all amounts received or expected as severance pay or accrued payments of any kind or from any source. If you and your spouse receive income from dividends, interest, rents, investments or operation of a business, profession or farm, which you own jointly, report one-half of the income as yours and one-half as your spouse's. Report Social Security Benefits (Green Check) on Line 2, and Supplemental Security Income (SSI) benefits (Gold Check) on Line 14.

ITEM 37A - Include market value of stocks, checking accounts, bank deposits, savings accounts and cash. Include one-half of the total value of those held jointly by you and your spouse.

ITEM 37B - Do not include the value of the single dwelling unit or that portion of real property used solely as your principal residence. On all other real estate reduce the market value by amount of the indebtedness thereon and further report only one-half of the net value when the real estate is held jointly between husband and wife.

ITEM 37C - Report the total market value of your rights and interest in all other property not included in Items 37A and 37B. Do not include value of ordinary personal effects necessary for your daily living such as an automobile, clothing and furniture. Include gifts, bequests and inheritances of all property other than cash.

ITEM 37D - Report all debts except mortgage(s) on real estate.

ITEM 37E - Report the total of Items 37A through 37C less 37D. This should be your NET WORTH.

70-131

X25
973

AVERAGE LENGTH, IN MINUTES, OF CLAIMANT HEARINGS BEFORE THE BVA

January 1982	2730 ÷ 68	=	40.14 minutes
February 1982	2665 ÷ 69	=	38.62 minutes
March 1982	3785 ÷ 96	=	39.42 minutes
April 1982	3530 ÷ 90	=	39.22 minutes
May 1982	2950 ÷ 77	=	38.31 minutes
June 1982	3614 ÷ 96	=	37.64 minutes
July 1982	3035 ÷ 72	=	42.15 minutes
August 1982	4490 ÷ 113	=	39.73 minutes
September 1982	5025 ÷ 131	=	38.35 minutes
October 1982	4335 ÷ 106	=	40.89 minutes
November 1982	3620 ÷ 93	=	38.92 minutes
December 1982	2925 ÷ 74	=	39.52 minutes
January 1983	4035 ÷ 99	=	40.75 minutes
February 1983	2605 ÷ 63	=	41.34 minutes
March 1983	4460 ÷ 118	=	37.79 minutes
April 1983	2575 ÷ 66	=	39.01 minutes
		AVERAGE	39.49 minutes

Compiled from documents A02863A - A02863SSS of the Veterans Administration's May 16, 1983 production.

Plf's Ex No. 74
(Standefer)
Depo

74-1

BOARD OF VETERANS APPEALS
FISCAL YEAR 1982
OVERALL REPRESENTATION

Representation	Total Cases	%	Allowed	%	Remanded	%	Denied	%	Other	%
AL	6,713	18.8	839	12.5	977	14.6	4,836	72.1	61	0.9
AMVETS	741	2.1	106	14.3	110	14.8	519	70.0	6	0.8
ARC	846	2.4	109	12.9	131	15.5	598	70.7	8	0.9
DAV	14,295	40.0	1,961	13.7	2,247	15.7	9,980	69.8	107	0.7
JWV	183	0.5	22	12.0	22	12.0	139	76.0	0	0
MOPH	208	0.6	33	15.9	37	17.8	136	65.4	2	1.0
PVA	233	0.7	37	15.9	39	16.7	150	64.4	7	3.0
VFW	4,023	11.3	504	12.5	600	14.9	2,871	71.4	48	1.2
St Svc Org	3,235	9.0	404	12.5	480	14.8	2,336	72.2	15	0.5
Atty/Agt	860	2.4	114	13.3	135	15.7	599	69.7	12	1.4
Other	311	0.9	41	13.2	40	12.9	228	73.3	2	0.6
None	4,110	11.5	481	11.7	600	14.6	3,003	73.1	26	0.6
Total	35,758	--	4,651	13.0	5,418	15.2	25,395	71.0	294	0.8
No Repr.	4,110	11.5	481	11.7	600	14.6	3,003	73.1	26	0.6
With Repr.	31,648	88.5	4,170	13.2	4,818	15.2	22,392	70.8	268	0.8
Svc Off	30,788	86.1	4,056	13.2	4,683	15.2	21,793	70.8	256	0.8

Plf's Ex. No. 75
(Standefer Depo.)

AU1564

75

1407
975

REPRESENTATION IN APPEALED CASES
FISCAL YEAR 1981
OVERALL REPRESENTATION

RESENTATION	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
SONS	3,877	11.7	417	10.8	571	14.7	2,837	73.2	52	1.
AL	6,611	20.0	837	12.7	935	14.1	4,800	72.6	39	0.
AMVETS	581	1.8	79	13.6	78	13.4	419	72.1	5	0.
AEC	924	2.8	113	12.2	123	13.3	680	73.6	8	0.
DAV	12,290	37.2	1,656	13.5	1,700	13.8	8,827	71.8	107	0.
FAV	188	0.6	18	9.6	20	10.6	149	79.3	1	0.
MOPH	199	0.6	40	20.1	29	14.6	128	64.3	2	1.
PVA	159	0.5	23	14.5	35	22.0	96	60.4	5	3.
VFW	4,298	13.0	496	11.6	620	14.4	3,152	73.3	30	0.
ST SVC ORG	2,511	7.6	267	10.7	347	13.8	1,884	75.0	13	0.
ATTY & AGT	765	2.3	86	11.2	116	15.2	557	72.8	6	0.
OTHER	628	1.9	67	10.7	95	15.1	464	73.9	2	0.
TOTAL*	33,031	100.0	4,099	12.4	4,669	14.1	23,993	72.7	270	0.
NO RESENTATION	3,877	11.7	417	10.8	571	14.7	2,837	73.2	52	1.
ASES WITH RESENTATION	29,154	88.3	3,682	12.6	4,098	14.1	21,156	72.6	218	0.

tual output was 33,461. Discrepancy due to manual/ADP procedures in 1st Qtr. F.Y. 1981.

A01367

976

REPRESENTATION IN APPEALED CASES
FISCAL YEAR 1980
OVERALL REPRESENTATION

NOV 17 1980

Representation	TOTAL	%	ALLOWED	— %	REMANDED	— %	DENIED	— %	OTHER	— %
None	4,314	12.7	482	11.2	586	13.6	3,188	73.9	58	1.3
AL	6,834	20.1	857	12.5	899	13.2	5,036	73.7	42	0.6
VFW	3,795	11.1	408	10.8	599	15.8	2,756	72.6	32	0.8
DAV	12,425	36.5	1,619	13.0	1,846	14.9	8,863	71.3	97	0.8
AMRC	1,018	3.0	130	12.8	151	14.8	726	71.3	11	1.1
AMVETS	650	1.9	95	14.6	97	14.9	455	70.0	3	0.5
CWV	15	*	1	6.7	1	6.7	13	86.6	0	0.0
PVA	128	0.4	9	7.3	19	15.5	93	75.6	2	1.6
Attys/Agts	738	2.2	118	16.0	108	14.6	503	68.2	9	1.2
Other	4,118	12.1	507	12.3	586	14.2	2,997	72.8	28	0.7
TOTAL	34,030	100.0	4,226	12.4	4,892	14.4	24,630	72.4	282	0.8
No Repr.	4,314	12.7	482	11.2	586	13.6	3,188	73.9	58	1.3
Cases With Repr.	29,716	87.3	3,744	12.6	4,306	14.5	21,442	72.2	224	0.7

* less than 0.1%

A01365

75-3

(1704 977)

NOV 8 - 1979

REPRESENTATION IN APPEALED CASES
FISCAL YEAR 1979
OVERALL REPRESENTATION

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	5,571	15.9	611	11.0	711	12.7	4,189	75.2	60	1.1
AL	7,115	20.3	925	13.0	956	13.4	5,191	73.0	43	0.6
VFW	3,926	11.2	469	12.0	552	14.0	2,878	73.3	27	0.7
DAV	11,705	33.5	1,579	13.5	1,630	13.9	8,448	72.2	48	0.4
ANRC	999	2.9	145	14.5	145	14.5	705	70.6	4	0.4
AMVETS	585	1.7	93	15.9	76	13.0	410	70.1	6	1.0
CWV	9	*	2	22.2	0	0.0	7	77.8	0	0.0
JWV	88	0.3	10	11.4	10	11.4	67	76.1	1	1.1
Attys/Agts	744	2.1	86	11.6	116	15.6	536	72.0	6	0.8
Other	4,230	12.1	511	12.1	565	13.4	3,132	74.0	22	0.5
TOTAL	34,972	100.0	4,431	12.7	4,761	13.6	25,563	73.1	217	0.6
No Repr.	5,571	15.9	611	11.0	711	12.7	4,189	75.2	60	1.1
Cases With Repr.	29,401	84.1	3,820	13.0	4,050	13.8	21,374	72.7	157	0.5

* less than 0.1%

A0136)

75-

978

REPRESENTATION IN APPEALED CASES
FISCAL YEAR 1978
OVERALL REPRESENTATION

NOV 2 1978

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	5,662	15.9	604	10.7	923	16.3	4,074	72.0	61	1.0
AL	7,395	20.8	944	12.8	910	12.3	5,505	74.4	36	0.5
VFW	4,231	11.9	544	12.9	551	13.0	3,118	73.7	18	0.4
DAV	11,587	32.5	1,512	13.0	1,477	12.8	8,562	73.9	36	0.3
ANRC	1,235	3.5	169	13.7	143	11.6	916	74.2	7	0.5
AMVETS	509	1.4	72	14.1	66	13.0	370	72.7	1	0.2
CWV	8	*	1	12.5	1	12.5	6	75.0	-	
JWV	84	0.2	11	13.1	9	10.7	64	76.2	-	
Attys/Agts	708	2.0	96	13.6	123	17.4	484	68.8	5	0.7
Other	4,215	11.8	503	12.0	569	13.5	3,133	74.3	10	0.2
TOTAL	35,634	100.0	4,456	12.5	4,772	13.4	26,232	73.6	174	0.5
No Repr.	5,662	15.9	604	10.7	923	16.3	4,074	72.0	61	1.0
Cases With Repr.	29,972	84.1	3,852	12.9	3,849	12.8	22,158	73.9	113	0.4

* less than 0.1%

ADJUSTED

75-5

979

REPRESENTATION IN APPEALED CASES
FISCAL YEAR 1977
OVERALL REPRESENTATION

OCT 1 & 1977

Represen-tation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	5,730	17.2	589	10.3	956	16.7	4,121	71.9	64	1.1
AL	6,837	20.6	886	13.0	993	14.5	4,935	72.2	23	.3
VFW	4,259	12.8	557	13.1	649	15.2	3,039	71.4	14	.3
DAV	10,072	30.3	1,363	13.5	1,596	15.9	7,086	70.4	27	.2
ANRC	1,205	3.6	177	14.7	177	14.7	848	70.4	3	.2
AMVETS	436	1.3	69	15.8	52	11.9	315	72.3	-	
CWV	5	*	-		1	20.0	4	80.0	-	
JWV	114	.3	9	7.9	16	14.0	89	78.1	-	
Attys/Agts	739	2.2	98	13.3	144	19.5	493	66.7	4	.5
Other	3,899	11.7	486	12.5	636	16.3	2,762	70.8	15	.4
TOTAL	33,296	100.0	4,234	12.7	5,220	15.7	23,692	71.1	150	.5
No Repr.	5,730	17.2	589	10.3	956	16.7	4,121	71.9	64	1.1
Cases With Repr.	27,566	82.8	3,645	13.2	4,264	15.5	19,571	71.0	86	.3

* less than 0.1%

A0137 1

75-1

~~#12~~
(980)

REPRESENTATION IN APPEALED CASES
FISCAL YEAR 1976
OVERALL REPRESENTATION

CORRECTED 1/25/77

Representation	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER	%
None	4,753	16.7	468	9.9	703	14.8	3,509	73.8	73	1.5
AL	6,527	22.9	868	13.3	1,056	16.2	4,571	70.0	32	0.5
VFW	3,650	12.8	476	13.0	640	17.5	2,521	69.1	13	0.4
DAV	8,093	28.4	1,098	13.6	1,432	17.7	5,534	68.4	29	0.3
ANRC	1,124	4.0	157	14.0	192	17.1	770	68.5	5	0.4
AMVETS	382	1.3	51	13.4	64	16.8	266	69.6	1	0.2
CWV	4	*	2	50.0	-	-	2	50.0	-	-
JWV	118	0.4	14	11.9	17	14.4	84	71.2	3	2.5
Attys/Agts	666	2.4	90	13.5	105	15.8	465	69.8	6	0.9
Other	3,165	11.1	398	12.6	550	17.4	2,211	69.8	6	0.2
TOTAL	28,482	100.0	3,622	12.7	4,759	16.7	19,933	70.0	168	0.6
No Repr.	4,753	16.7	468	9.9	703	14.8	3,509	73.8	73	1.5
Cases With Repr.	23,729	83.3	3,154	13.3	4,056	17.1	16,424	69.2	95	0.4

* less than 0.1%

A01572

(43)
(981)

DISPOSITION OF VETERAN ADMINISTRATION
CLAIMS ON APPEAL
10/01/81 - 09/30/82

	% Allowed	% Denied	Total
Disability Compensation	13.8	70.8	27,997
Disability Pension	8.2	76.7	1,981
Death Compensation	9.7	73.4	1,792
Death Pension	9.0	73.5	356

- prepared from Exhibit L to the Veteran Administration's 02/04/83 response to Plaintiff's Freedom of Information Act Request

Plf's Ex No. 76
(Standefer Depo.)

76-1

BVA
DISPOSITION OF APPEALS BY CATEGORY OF CASE REPORT
FROM 10/01/81 TO 09/30/82

VLL 11
REPORT RUN ON 01/28/83

APPEAL CATEGORY	ALLOWED	ADMIN ALLOWED	REMANDED	DENIED	VACATED	DISMISD	ADMIN REMANDED	WITHDRAWN OUR	WITHDRAWN VUR	OTHER	TOTAL DECISIONS	BENEFITS GRANTED	RECON BY LETTER	TOTAL DISPOSITIONS
CH DIS	3	0	8	61	0	0	0	0	1	0	73	1	0	74
DIS CMP	3,813	62	3,605	19,808	14	9	501	144	61	2	27,997	883	3	28,883
DIS PNS	162	0	242	1,520	1	2	33	10	9	2	1,981	110	2	2,093
DTH CMP	174	1	254	1,317	1	1	39	5	0	0	1,792	18	0	1,810
DTH PNS	32	0	46	262	1	0	12	1	1	1	356	14	0	370
FORFEIT	1	0	4	13	0	0	0	1	0	0	19	0	0	19
UPT	45	0	85	422	1	5	18	3	2	0	581	17	1	599
INSRNC	5	0	7	85	0	1	2	0	1	0	101	1	0	102
L/G	22	0	56	90	0	0	4	2	0	0	174	5	1	180
VH+E	78	0	98	531	1	1	19	0	4	0	732	37	0	769
MDEA	1	0	4	15	0	1	1	0	0	0	22	1	0	24
MAIVER	220	0	324	958	0	3	27	4	5	1	1,542	101	1	1,644
MISC	13	0	14	101	0	5	1	3	1	0	138	5	0	143
RECONS	9	10	12	212	2	2	2	0	0	1	250	1	92	343
TOTAL	4,578	73	4,759	25,395	21	30	659	151	85	7	35,758	1,194	100	37,052

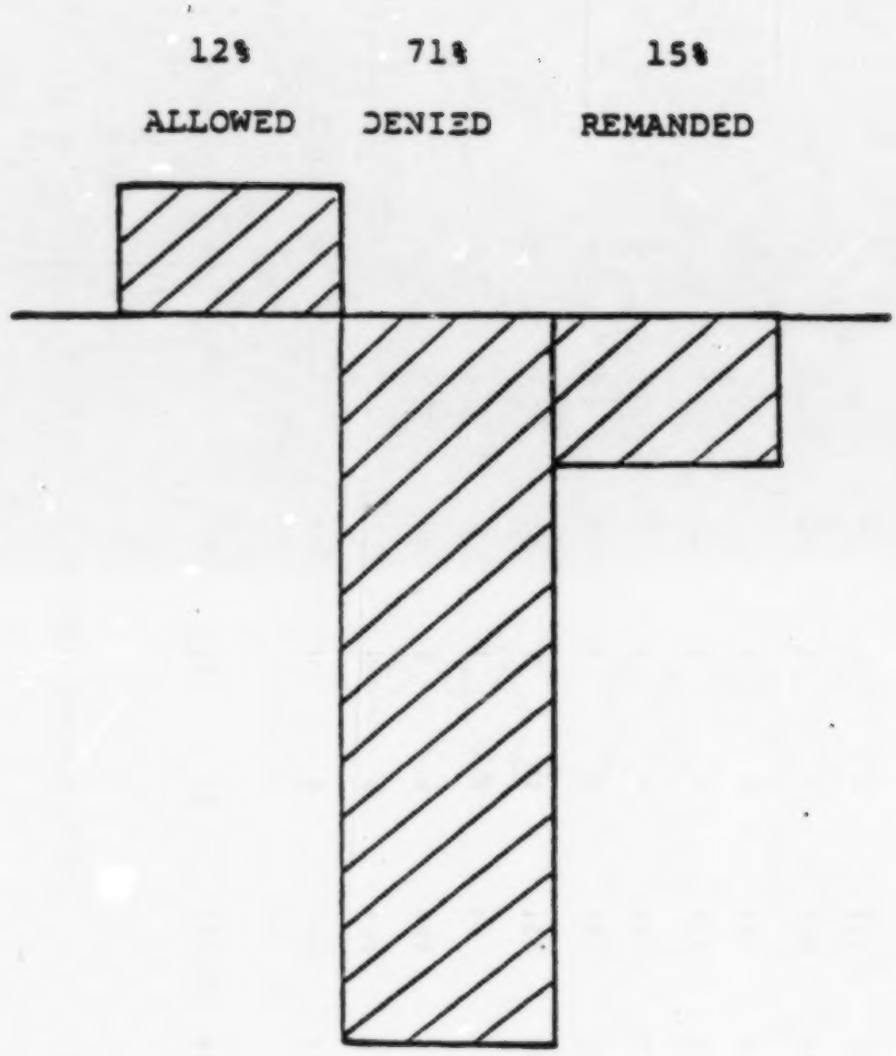
TOTAL RECORDS INPUT: 37,055 TOTAL RECORDS USED ON THIS REPORT: 37,052 TOTAL RECORDS NOT PROCESSED: 3

FCCCC133 EXHIBIT "L"

~~(115~~ 983

Total BVA Cases in 1982* = 35,758

*Data from Exhibit J (of February 4, 1983 FOIA Request Response from BVA)



(1981 figures: 12.4% 72.7% 14.1%)

Plf's Ex No 77
(Standifer Depo)

77-1

984

BOARD OF VETERANS APPEALS
FISCAL YEAR 1982
OVERALL REPRESENTATION

Represen-tation	Total Cases	%	Allowed	%	Remanded	%	Denied	%	Other	%
AL	6,713	18.8	839	12.5	977	14.6	4,836	72.1	61	0.9
AMVETS	741	2.1	106	14.3	110	14.8	519	70.0	6	0.8
ARC	846	2.4	109	12.9	131	15.5	598	70.7	8	0.9
DAV	14,295	40.0	1,961	13.7	2,247	15.7	9,980	69.8	107	0.7
JWV	183	0.5	22	12.0	22	12.0	139	76.0	0	0
MOPH	208	0.6	33	15.9	37	17.8	136	65.4	2	1.0
PVA	233	0.7	37	15.9	39	16.7	150	64.4	7	3.0
VFW	4,023	11.3	504	12.5	600	14.9	2,871	71.4	48	1.2
St Svc Org	3,235	9.0	404	12.5	480	14.8	2,336	72.2	15	0.5
..cty/Agt	860	2.4	114	13.3	135	15.7	599	69.7	12	1.4
Other	311	0.9	41	13.2	40	12.9	228	73.3	2	0.6
None	4,110	11.5	481	11.7	600	14.6	3,003	73.1	26	0.6
Total	35,758	--	4,651	13.0	5,418	15.2	25,395	71.0	294	0.8
No Repr.	4,110	11.5	481	11.7	600	14.6	3,003	73.1	26	0.6
With Repr.	31,648	88.5	4,170	13.2	4,818	15.2	22,392	70.8	268	0.8
Svc Off	30,788	86.1	4,056	13.2	4,683	15.2	21,793	70.8	256	0.8

Repr-FY 1982 J3
FCOCC123

77-2.

EXHIBIT "J"

(1117)
(985)

REPRESENTATION IN APPEALED CASES
FISCAL YEAR 1981
OVERALL REPRESENTATION

SENTATION	TOTAL	%	ALLOWED	%	REMANDED	%	DENIED	%	OTHER
VSO	3,877	11.7	417	10.8	571	14.7	2,837	73.2	52
L	6,611	20.0	837	12.7	935	14.1	4,800	72.6	39
VETS	581	1.8	79	13.6	78	13.4	419	72.1	5
RC	924	2.8	113	12.2	123	13.3	680	73.6	8
AV	12,290	37.2	1,656	13.5	1,700	13.8	8,827	71.8	107
AV	188	0.6	18	9.6	20	10.6	149	79.3	1
PH	199	0.6	40	20.1	29	14.6	128	64.3	2
A	159	0.5	23	14.5	35	22.0	96	60.4	5
W	4,298	13.0	496	11.6	620	14.4	3,152	73.3	30
SVC ORG	2,511	7.6	267	10.7	347	13.8	1,884	75.0	13
TY & AGT	765	2.3	86	11.2	116	15.2	557	72.8	6
HER	628	1.9	67	10.7	95	15.1	464	73.9	2
TAL*	33,031	100.0	4,099	12.4	4,669	14.1	23,993	72.7	270
NO ESENTATION	3,877	11.7	417	10.8	571	14.7	2,837	73.2	52
ES WITH ESENTATION	29,154	88.3	3,682	12.6	4,098	14.1	21,156	72.6	218

ual output was 33,461. Discrepancy due to manual/ADP procedures in 1st Qtr. F.Y. 1981.

FCCC124

77-3

1118

986

BVA REPRESENTATION IN APPEALED CASES
10/80 - 09/81

Representative	Total Decisions	%
AL	6,611	20
AM Vets	581	1.8
ARC	924	2.8
DAV	12,290	37.2
JWV	188	.6
MOPH	199	.6
PVA	159	.5
VFW	4,298	13
St. Svc. Org.	2,511	7.6
Atty. & Ag.	765	2.3
Other	628	1.9
None	3,877	11.7
TOTAL:	33,031	

- prepared from Exhibit U to the Veteran Administration's 03/18/83 response to Plaintiff's Freedom of Information Act Request

Plf's Ex. No. 78
(Standefer Depo.)

HVA
REPRESENTATIVE IN APPEALED CASES
FROM 10/90 TO 03/91

PAGE 11
VLJ M
REPORT PRINTED

REPRESENTATION	ALLOWED	ADMIN ALLOWED	REMANDED BY DECISION	DENIED	VACATED	DISMISSD	ADMIN REMANDED	W/D DEATH OF VET	W/D BY VET OR REP	OTHER	TOTAL DCSNS	BENEFITS GRANTED	RECON BY LETTER	TOTAL DISPOS
AL	825	12	843	4,888	8	8	92	17	9	3	6,611	231	5	6,807
AMVETS	79	0	71	419	3	2	7	0	0	0	581	16	0	597
ARC	109	0	103	688	0	3	20	3	1	1	929	32	3	959
DAV	1,633	23	1,534	8,827	8	16	166	50	24	9	12,290	507	10	12,807
JAV	18	0	17	169	0	0	3	0	0	1	188	13	1	202
VOPH	39	1	28	128	0	1	1	1	0	0	199	8	0	207
PVA	22	1	30	96	1	0	5	0	0	0	159	7	0	166
VFW	484	12	553	3,152	3	2	67	18	9	2	4,298	181	1	4,480
ST SVC ORG	260	7	279	1,888	1	3	68	8	4	1	2,511	75	2	2,588
ATTY & AGT	83	3	92	557	0	1	24	1	1	3	765	18	1	784
OTHER	65	2	79	464	0	0	14	1	1	0	626	61	0	687
NONE	615	2	490	2,837	3	13	81	6	7	23	3,877	141	0	4,058
TOTALS	4,032	67	4,119	23,993	23	47	550	97	56	47	33,031	1,330	23	34,384

FL000123

988

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**********************************************************************
*                                                                    *
*                    V E T E R A N S   A D M I N I S T R A T I O N   *
*                                                                    *
*                        D A T A   P R O C E S S I N G   C E N T E R *
*                                                                    *
*                              P H I L A D E L P H I A               *
*                                                                    *
*                             .........................              *
*                             .       OS/MFT          .              *
*                             .     RELEASE 21.8      .              *
*                             .      05/05/83         .              *
*                             .      13 18 58         .              *
*                             .........................              *
*                                                                    *
**********************************************************************

PPPPPPPPPPP   VV         VV   AAAAAAAAAA    RRRRRRRRRRR    2222222222   SSSSSSSSSSS
PPPPPPPPPPPP  VV         VV  AAAAAAAAAAAA   RRRRRRRRRRRR  222222222222  SSSSSSSSSSS
PP        PP  VV         VV  AA        AA   RR        RR  22        22  SS
PP        PP  VV         VV  AA        AA   RR        RR          22  SS
PP        PP  VV         VV  AA        AA   RR        RR          22  SS
PPPPPPPPPPPP  VV         VV  AAAAAAAAAAAA   RRRRRRRRRRRR        22    SSSSSSSSS
PPPPPPPPPPP   VV         VV  AAAAAAAAAAAA   RRRRRRRRRRR       22      SSSSSSSSS
PP             VV       VV  AA        AA   RR     RR        22              SS
PP             VV  VV   VV  AA        AA   RR      RR      22              SS
PP              VVVV        AA        AA   RR       RR   2222222222222  SSSSSSSSSSS
PP               VV         AA        AA   RR        RR  222222222222  SSSSSSSSSSS

                          3333333333
                         333333333333
                         33        33
                                   33
                                   33
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                              3333
                                   33
                                   33
                         33        33
                         333333333333
                          3333333333

**************************************
*        A T T E N T I O N           *
**************************************
*  WE ARE NOW PROCESSING UNDER       *
*  RELEASE 21.8.  IF THERE ARE       *
*  ANY UNUSUAL PROBLEMS CONTACT      *
*  THE DPC'S TECHNICAL               *
*  ASSISTANCE STAFF.                 *
**************************************
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PLF 99
Exhibit
Date 6/24/83
Wit Woodall
Carolyn M. Wilson, CSR 4913

NOTICE OF DISAGREEMENT DATE 05/05/83 PAGE 1

DISPOSITION BY REASONS - QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1<

REG OFF	ALLOWANCE OF BENEFIT SOUGHT 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC 1ST	2ND	3RD	4TH	CUM	OTHER REASONS 1ST	2ND	3RD	4TH	CUM
	SUBSTANTIVE APPEALS FILED 1ST	2ND	3RD	4TH	CUM	W/D BY CLAIMANT OR REPRESENT 1ST	2ND	3RD	4TH	CUM					
BOSTON	38	34	0	0	72	166	173	0	0	339	43	43	0	0	86
	335	384	0	0	719	17	58	0	0	75					
PROVIDNC	9	7	0	0	16	48	19	0	0	67	3	1	0	0	4
	72	61	0	0	133	4	2	0	0	6					
NEW YORK	25	26	0	0	51	200	241	0	0	441	61	44	0	0	105
	347	302	0	0	649	14	10	0	0	24					
BUFFALO	17	10	0	0	27	92	98	0	0	190	16	23	0	0	39
	144	170	0	0	314	0	1	0	0	1					
HARTFORD	3	3	0	0	6	39	47	0	0	86	25	15	0	0	40
	117	104	0	0	221	2	1	0	0	3					
NEWARK	20	21	0	0	41	70	55	0	0	125	40	19	0	0	59
	189	146	0	0	335	10	8	0	0	18					
PHILA	13	20	0	0	33	158	181	0	0	339	20	28	0	0	48
	350	297	0	0	647	13	10	0	0	23					
PITTSBUR	12	14	0	0	26	68	66	0	0	134	33	14	0	0	49
	178	207	0	0	385	21	26	0	0	47					
BALTIMOR	13	16	0	0	29	58	62	0	0	120	3	1	0	0	4
	76	43	0	0	119	14	9	0	0	23					
ROKE	49	44	0	0	93	112	139	0	0	251	13	25	0	0	38
	180	176	0	0	356	18	16	0	0	34					
HUNTGTON	14	11	0	0	25	97	74	0	0	171	2	3	0	0	5
	151	118	0	0	269	5	8	0	0	13					
ATLANTA	55	52	0	0	107	155	156	0	0	311	21	15	0	0	36
	247	224	0	0	471	6	7	0	0	13					
STPETER	76	61	0	0	137	475	455	0	0	930	36	36	0	0	72
	724	658	0	0	1382	19	13	0	0	32					
WINSALEM	24	20	0	0	44	141	198	0	0	339	31	28	0	0	59
	300	320	0	0	620	9	9	0	0	18					
COLUMBIA	11	3	0	0	14	60	114	0	0	174	1	14	0	0	15
	181	209	0	0	390	4	13	0	0	17					

99-6

990

NOTICE OF DISAGREEMENT DATE 05/05/83 PAGE

DISPOSITION BY REASONS -- QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1<

REG OFF	ALLOWANCE OF BENEFIT SOUGHT 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC 1ST	2ND	3RD	4TH	CUM	OTHER REASONS 1ST	2ND	3RD	4TH	CUM
	SUBSTANTIVE APPEALS FILED 1ST	2ND	3RD	4TH	CUM	W/D BY CLAIMANT OR REPRESENT 1ST	2ND	3RD	4TH	CUM					
NASHVILL	41	23	0	0	64					132	94	0	0	226	16	13	0	0	29
	197	176	0	0	373									14	8	0	0	22	
NE ENS	28	29	0	0	57					188	200	0	0	388				39	36	0	0	75
	313	194	0	0	507									3	0	0	0	3				
MONTGOM	7	14	0	0	21					77	197	0	0	274				7	8	0	0	15
	295	303	0	0	598									7	13	0	0	20				
JACKSON	23	13	0	0	36					87	75	0	0	162				17	12	0	0	29
	130	163	0	0	293									7	6	0	0	13				
CLEVELAN	38	33	0	0	71					244	289	0	0	533				33	32	0	0	65
	346	409	0	0	755									13	17	0	0	30				
INDPOLIS	26	30	0	0	56					93	118	0	0	211				27	27	0	0	54
	229	237	0	0	466									22	34	0	0	56				
LOUISVIL	9	12	0	0	21					98	80	0	0	178				23	18	0	0	41
	246	207	0	0	453									4	6	0	0	10				
CHICAGO	31	29	0	0	60					134	96	0	0	230				8	10	0	0	18
	205	157	0	0	362									26	11	0	0	37				
DETROIT	18	26	0	0	44					250	219	0	0	469				13	23	0	0	36
	340	319	0	0	659									1	3	0	0	4				
MILWAUKE	4	10	0	0	14					77	52	0	0	169				5	1	0	0	6
	128	113	0	0	241									1	2	0	0	3				
STLOUIS	33	39	0	0	72					134	128	0	0	262				23	27	0	0	50
	210	213	0	0	423									14	4	0	0	18				
DESMOINS	14	19	0	0	33					68	51	0	0	119				2	2	0	0	4
	76	69	0	0	145									10	10	0	0	20				
LINCOLN	5	4	0	0	9					37	26	0	0	63				15	10	0	0	25
	34	45	0	0	79									2	2	0	0	4				
STPAUL	14	17	0	0	31					80	77	0	0	157				14	27	0	0	41
	130	152	0	0	282									6	4	0	0	12				
DENVER	20	17	0	0	37					94	58	0	0	152				7	5	0	0	12
	145	91	0	0	236									15	13	0	0	28				

99-7

DISPOSITION BY REASONS - QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1<

REG OFF	ALLOWANCE OF BENEFIT SOUGHT 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC 1ST	2ND	3RD	4TH	CUM	OTHER REASONS 1ST	2ND	3RD	4TH	CUM
	SUBSTANTIVE APPEALS FILED					W/D BY CLAIMANT OR REPRESENT									
ALBUQUER	13	18	0	0	31 124	75	0	0	75 199	70	0	0	145 5	3	0	0	25 6	6	0	0	31
SLCITY	1	3	0	0	4 9	12	0	0	6 21	30	0	0	16 1	0	0	0	0 1	0	0	0	0
SFRANCIS	30	25	0	0	55 34	30	0	0	264 64	360	0	0	724 0	7	0	0	24 7	19	0	0	43
LOSANGEL	28	30	0	6	58 392	272	0	0	186 664	298	0	0	484 16	17	0	0	23 35	23	0	0	46
PHOENIX	15	14	0	0	29 142	172	0	0	96 314	81	0	0	177 4	3	0	0	13 7	24	0	0	37
SEATTLE	32	28	0	0	60 186	140	0	0	130 326	97	0	0	227 1	8	0	0	31 9	11	0	0	42
BOISE	8	6	0	0	14 34	39	0	0	23 73	36	0	0	59 5	2	0	0	2 7	5	0	0	7
PORTLAND	5	4	0	0	9 84	82	0	0	85 166	75	0	0	160 2	1	0	0	4 3	3	0	0	7
WACO	78	74	0	0	152 322	352	0	0	242 674	214	0	0	456 12	16	0	0	15 28	14	0	0	29
L. OCK	17	31	0	0	48 173	146	0	0	72 319	94	0	0	166 1	5	0	0	9 6	10	0	0	19
MUSKOGEE	18	8	0	0	26 93	100	0	0	105 193	98	0	0	203 2	11	0	0	3 13	3	0	0	6
RENO	0	4	0	0	4 54	61	0	0	32 115	46	0	0	78 0	2	0	0	0 2	0	0	0	0
MANILA	7	3	0	0	10 152	118	0	0	80 270	64	0	0	144 1	3	0	0	4 4	4	0	0	8
HONOLULU	0	1	0	0	1 15	25	0	0	16 40	14	0	0	30 2	3	0	0	0 5	1	0	0	1
HOUSTON	31	35	0	0	66 225	280	0	0	196 505	170	0	0	366 13	8	0	0	29 21	45	0	0	74

99-8.

NOTICE OF DISAGREEMENT DATE 05/05/83 PAGE 4

DISPOSITION BY REASONS - QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1<

REG OFF	ALLOWANCE OF BENEFIT SOUGHT 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC 1ST	2ND	3RD	4TH	CUM	OTHER REASONS 1ST	2ND	3RD	4TH	CUM
	SUBSTANTIVE APPEALS FILED 1ST	2ND	3RD	4TH	CUM	W/D BY CLAIMANT OR REPRESENT 1ST	2ND	3RD	4TH	CUM					
JUNEAU	3	0	0	0	3 6	6	0	0	6 12	5	0	0	11 1	0	0	0	1 1	3	0	0	4
WASH DC	3	5	0	0	6 104	111	0	0	60 215	93	0	0	153 8	9	0	0	12 17	10	0	0	22
MANCHSTR	5	9	0	0	14 41	47	0	0	23 88	23	0	0	46 2	0	0	0	6 2	5	0	0	11
SANDIEGO	14	15	0	0	29 116	113	0	0	89 231	90	0	0	179 13	14	0	0	14 27	14	0	0	28
TOGUS	3	1	0	0	4 58	66	0	0	37 124	45	0	0	82 6	2	0	0	2 8	1	0	0	3
WRJCT	1	6	0	0	7 25	25	0	0	19 50	16	0	0	35 2	0	0	0	2 2	2	0	0	4
FTHARISN	6	9	0	0	17 113	74	0	0	63 187	24	0	0	87 0	6	0	0	15 8	8	0	0	23
FARGO	0	0	0	0	0 16	27	0	0	9 43	22	0	0	31 1	1	0	0	0 2	2	0	0	2
SIOUXFLL	3	3	0	0	6 56	53	0	0	35 109	37	0	0	72 0	0	0	0	3 0	0	0	0	3
(_/ENNE	2	4	0	0	6 14	18	0	0	10 32	12	0	0	22 3	4	0	0	0 7	0	0	0	0
WICHITA	1	5	0	0	6 104	90	0	0	153 194	23	0	0	176 1	1	0	0	29 2	11	0	0	40
SANJUAN	1	4	0	0	5 291	356	0	0	55 647	67	0	0	122 0	0	0	0	7 0	35	0	0	42
WILMGTON	5	6	0	0	11 40	34	0	0	13 74	11	0	0	24 0	0	0	0	0 0	3	0	0	3
TOTAL	1022	1010	0	0	2032 9640	9191	0	0	6012 18831	6073	0	0	12085 407	452	0	0	870 859	824	0	0	1694

99-9

DISPOSITION BY REASONS - QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1)

REG OFF	ALLOWANCE OF BENEFIT SOUGHT 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC 1ST	2ND	3RD	4TH	CUM	OTHER REASONS 1ST	2ND	3RD	4TH	CUM
	(% OF TOTAL DISP)					(% OF TOTAL DISP)					(% OF TOTAL DISP)				
	SUBSTANTIVE APPEALS FILED 1ST	2ND	3RD	4TH	CUM						W/D BY CLAIMANT OR REPRESENT 1ST	2ND	3RD	4TH	CUM
	(% OF TOTAL DISP)										(% OF TOTAL DISP)				
BOSTON	6.3	4.9	0.0	0.0	5.6	27.7	25.0	0.0	0.0	26.3	7.2	6.2	0.0	0.0	6.7
	55.9	55.5	0.0	0.0	55.7					2.8	6.4	0.0	0.0	5.8	
PROVIDNC	6.6	7.8	0.0	0.0	7.1	35.3	21.1	0.0	0.0	29.6	2.2	1.1	0.0	0.0	1.8
	52.9	67.8	0.0	0.0	58.8					2.9	2.2	0.0	0.0	2.7	
NEW YORK	3.9	4.2	0.0	0.0	4.0	30.9	38.7	0.0	0.0	34.7	9.4	7.1	0.0	0.0	8.3
	53.6	48.6	0.0	0.0	51.1					2.2	1.6	0.0	0.0	1.9	
BUFFALO	6.3	3.3	0.0	0.0	4.7	34.2	32.5	0.0	0.0	33.3	5.9	7.6	0.0	0.0	6.8
	53.6	56.3	0.0	0.0	55.0					0.0	0.3	0.0	0.0	0.2	
HARTFORD	1.6	1.8	0.0	0.0	1.7	21.0	27.6	0.0	0.0	24.2	13.4	8.8	0.0	0.0	11.2
	62.9	61.2	0.0	0.0	62.1					1.1	0.6	0.0	0.0	0.8	
NEWARK	6.1	8.4	0.0	0.0	7.1	21.3	22.1	0.0	0.0	21.6	12.2	7.6	0.0	0.0	10.2
	57.4	58.6	0.0	0.0	58.0					3.0	3.2	0.0	0.0	3.1	
PHILA	2.3	3.7	0.0	0.0	3.0	28.5	33.8	0.0	0.0	31.1	3.6	5.2	0.0	0.0	4.4
	63.2	55.4	0.0	0.0	59.4					2.3	1.9	0.0	0.0	2.1	
PITTSBUR	3.8	4.3	0.0	0.0	4.1	21.8	20.1	0.0	0.0	20.9	10.6	4.9	0.0	0.0	7.6
	57.1	62.9	0.0	0.0	60.1					6.7	7.9	0.0	0.0	7.3	
BALTIMOR	7.9	12.2	0.0	0.0	9.6	35.4	47.3	0.0	0.0	40.7	1.8	0.8	0.0	0.0	1.4
	46.3	32.8	0.0	0.0	40.3					8.5	6.9	0.0	0.0	7.8	
ANOKE	13.2	11.0	0.0	0.0	12.0	30.1	34.8	0.0	0.0	32.6	3.5	6.3	0.0	0.0	4.9
	48.4	44.0	0.0	0.0	46.1					4.8	4.0	0.0	0.0	4.4	
HUNTGTON	5.2	5.1	0.0	0.0	5.2	36.1	34.6	0.0	0.0	35.4	0.7	1.4	0.0	0.0	1.0
	56.1	55.1	0.0	0.0	55.7					1.9	3.7	0.0	0.0	2.7	
ATLANTA	11.4	11.6	0.0	0.0	11.4	32.0	34.4	0.0	0.0	33.2	4.3	3.3	0.0	0.0	3.8
	51.0	49.3	0.0	0.0	50.2					1.2	1.5	0.0	0.0	1.4	
STPETER	5.7	5.0	0.0	0.0	5.4	35.7	37.2	0.0	0.0	36.4	2.7	2.9	0.0	0.0	2.8
	54.4	53.8	0.0	0.0	54.1					1.4	1.1	0.0	0.0	1.3	
WINSALEM	4.8	3.5	0.0	0.0	4.1	27.9	34.4	0.0	0.0	31.4	6.1	4.9	0.0	0.0	5.5
	59.4	55.7	0.0	0.0	57.4					1.8	1.6	0.0	0.0	1.7	
COLUMBIA	4.3	0.8	0.0	0.0	2.3	22.3	32.3	0.0	0.0	28.5	0.4	4.0	0.0	0.0	2.5
	70.4	59.2	0.0	0.0	63.9					1.6	3.7	0.0	0.0	2.8	

DISPOSITION BY REASONS - QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1)

REG OFF	ALLOWANCE OF BENEFIT SOUGHT (% OF TOTAL DISP) 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC (% OF TOTAL DISP) 1ST	2ND	3RD	4TH	CUM	OTHER REASONS (% OF TOTAL DISP) 1ST	2ND	3RD	4TH	CUM
	SUBSTANTIVE APPEALS FILED					W/D BY CLAIMANT OR REPRESENT									
	1ST	2ND	3RD	4TH	CUM	1ST	2ND	3RD	4TH	CUM	1ST	2ND	3RD	4TH	CUM
	(% OF TOTAL DISP)					(% OF TOTAL DISP)					(% OF TOTAL DISP)				
NASHVILL	10.3	7.3	0.0	0.0	9.0	33.0	29.9	0.0	0.0	31.7	4.0	4.1	0.0	0.0	4.1
	49.3	56.1	0.0	0.0	52.2	3.5	2.5	0.0	0.0	3.1					
NE ENS	4.9	6.3	0.0	0.0	5.5	32.9	43.6	0.0	0.0	37.7	6.8	7.8	0.0	0.0	7.3
	54.8	42.3	0.0	0.0	49.2	0.5	0.0	0.0	0.0	0.3					
MONTGOM	1.8	2.6	0.0	0.0	2.3	19.6	36.8	0.0	0.0	29.5	1.8	1.5	0.0	0.0	1.6
	75.1	56.6	0.0	0.0	64.4	1.8	2.4	0.0	0.0	2.2					
JACKSON	6.7	4.8	0.0	0.0	6.0	33.0	27.9	0.0	0.0	30.4	6.4	4.5	0.0	0.0	5.4
	49.2	60.6	0.0	0.0	55.0	2.7	2.2	0.0	0.0	2.4					
CLEVELAN	5.6	4.2	0.0	0.0	4.9	36.2	37.1	0.0	0.0	36.7	4.9	4.1	0.0	0.0	4.5
	51.3	52.4	0.0	0.0	51.9	1.9	2.2	0.0	0.0	2.1					
INDPOLIS	6.5	6.7	0.0	0.0	6.6	22.4	26.5	0.0	0.0	25.0	6.8	6.1	0.0	0.0	6.4
	57.7	53.1	0.0	0.0	55.3	5.5	7.6	0.0	0.0	6.6					
LOUISVIL	2.4	3.7	0.0	0.0	3.0	25.8	24.8	0.0	0.0	25.3	6.1	5.6	0.0	0.0	5.8
	64.7	64.1	0.0	0.0	64.4	1.1	1.9	0.0	0.0	1.4					
CHICAGO	7.7	9.6	0.0	0.0	8.5	33.2	31.7	0.0	0.0	32.5	2.0	3.3	0.0	0.0	2.5
	50.7	51.8	0.0	0.0	51.2	6.4	3.6	0.0	0.0	5.2					
DETROIT	2.9	4.4	0.0	0.0	3.6	40.2	37.1	0.0	0.0	38.7	2.1	3.9	0.0	0.0	3.0
	54.7	54.1	0.0	0.0	54.4	0.2	5.5	0.0	0.0	0.3					
MILWAUKE	1.9	4.6	0.0	0.0	3.2	35.8	42.2	0.0	0.0	39.0	2.3	0.5	0.0	0.0	1.4
	59.5	51.8	0.0	0.0	55.7	0.5	0.9	0.0	0.0	0.7					
STLOUIS	8.0	9.5	0.0	0.0	8.7	32.4	31.1	0.0	0.0	31.8	5.6	6.6	0.0	0.0	6.1
	50.7	51.8	0.0	0.0	51.3	3.4	1.0	0.0	0.0	2.2					
DESMOINS	8.2	12.6	0.0	0.0	10.3	40.0	33.8	0.0	0.0	37.1	1.2	1.3	0.0	0.0	1.2
	44.7	45.7	0.0	0.0	45.2	5.9	6.6	0.0	0.0	6.2					
LINCOLN	5.4	4.6	0.0	0.0	5.0	39.8	29.9	0.0	0.0	35.0	16.1	11.5	0.0	0.0	13.9
	36.6	51.7	0.0	0.0	43.9	2.2	2.3	0.0	0.0	2.2					
STPAUL	5.7	6.1	0.0	0.0	5.9	32.5	27.8	0.0	0.0	30.6	5.7	9.7	0.0	0.0	7.8
	52.8	54.9	0.0	0.0	53.9	3.3	1.4	0.0	0.0	2.3					
DENVER	7.1	9.2	0.0	0.0	8.0	33.5	31.5	0.0	0.0	32.7	2.6	2.7	0.0	0.0	2.6
	51.6	49.5	0.0	0.0	50.8	5.3	7.1	0.0	0.0	6.0					

99:17

NOTICE OF DISAGREEMENT DATE 05/05/83 PAGE 3

DISPOSITION BY REASONS - QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1)

REG OFF	ALLOWANCE OF BENEFIT SOUGHT 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC 1ST	2ND	3RD	4TH	CUM	OTHER REASONS 1ST	2ND	3RD	4TH	CUM
	(% OF TOTAL DISP)					(% OF TOTAL DISP)					(% OF TOTAL DISP)				
	SUBSTANTIVE APPEALS FILED 1ST	2ND	3RD	4TH	CUM	W/D BY CLAIMANT OR REPRESENT 1ST	2ND	3RD	4TH	CUM					
	(% OF TOTAL DISP)					(% OF TOTAL DISP)									
ALBUQUER	5.4	10.6	0.0	0.0	7.5	31.0	40.7	0.0	0.0	35.0	10.3	3.5	0.0	0.0	7.5
	51.2	43.6	0.0	0.0	48.1	2.1	1.7	0.0	0.0	1.9					
SLCITY	5.9	12.0	0.0	0.0	9.5	35.3	40.0	0.0	0.0	36.1	0.0	0.0	0.0	0.0	0.0
	52.9	48.0	0.0	0.0	50.0	5.9	0.0	0.0	0.0	2.4					
SFRANCIS	6.6	5.7	0.0	0.0	6.2	80.5	81.6	0.0	0.0	81.1	5.3	4.3	0.0	0.0	4.8
	7.5	6.8	0.0	0.0	7.2	0.0	1.6	0.0	0.0	0.8					
LOSANGEL	4.3	4.7	0.0	0.0	4.5	28.7	46.6	0.0	0.0	37.6	3.6	3.6	0.0	0.0	3.6
	60.6	42.5	0.0	0.0	51.6	2.8	2.7	0.0	0.0	2.7					
PHOENIX	5.6	4.8	0.0	0.0	5.1	35.6	27.6	0.0	0.0	31.4	4.8	8.2	0.0	0.0	6.6
	52.6	58.5	0.0	0.0	55.7	1.5	1.0	0.0	0.0	1.2					
SEATTLE	6.4	9.9	0.0	0.0	9.0	34.2	34.2	0.0	0.0	34.2	8.2	3.9	0.0	0.0	6.3
	48.9	49.3	0.0	0.0	49.1	0.3	2.8	0.0	0.0	1.4					
BOISE	11.1	8.9	0.0	0.0	9.9	31.9	40.0	0.0	0.0	36.4	2.8	5.6	0.0	0.0	4.3
	47.2	43.3	0.0	0.0	45.1	6.9	2.2	0.0	0.0	4.3					
PORTLAND	2.8	2.4	0.0	0.0	2.6	47.2	45.5	0.0	0.0	46.4	2.2	1.8	0.0	0.0	2.0
	46.7	49.7	0.0	0.0	48.1	1.1	0.6	0.0	0.0	0.9					
WACO	11.7	11.0	0.0	0.0	11.4	36.2	31.9	0.0	0.0	34.1	2.2	2.1	0.0	0.0	2.2
	48.1	52.5	0.0	0.0	50.3	1.8	2.4	0.0	0.0	2.1					
LITTLEROCK	6.3	10.8	0.0	0.0	8.6	26.5	32.9	0.0	0.0	29.7	3.3	3.5	0.0	0.0	3.4
	63.6	51.0	0.0	0.0	57.2	0.4	1.7	0.0	0.0	1.1					
MUSKOGEE	8.1	3.6	0.0	0.0	5.9	47.5	44.5	0.0	0.0	46.0	1.4	1.4	0.0	0.0	1.4
	42.1	45.6	0.0	0.0	43.8	0.9	5.0	0.0	0.0	2.9					
RENO	0.0	3.5	0.0	0.0	2.0	37.2	40.7	0.0	0.0	39.2	0.0	0.0	0.0	0.0	0.0
	62.8	54.0	0.0	0.0	57.8	0.0	1.8	0.0	0.0	1.0					
MANILA	2.9	1.6	0.0	0.0	2.3	32.8	33.3	0.0	0.0	33.0	1.6	2.1	0.0	0.0	1.8
	62.3	61.5	0.0	0.0	61.9	0.4	1.6	0.0	0.0	0.9					
HONOLULU	0.0	2.3	0.0	0.0	1.3	48.5	31.8	0.0	0.0	39.0	0.0	2.3	0.0	0.0	1.3
	45.5	56.8	0.0	0.0	51.9	6.1	6.8	0.0	0.0	6.5					
HOUSTON	6.3	6.5	0.0	0.0	6.4	39.7	31.6	0.0	0.0	35.6	5.9	8.4	0.0	0.0	7.2
	45.5	52.0	0.0	0.0	48.9	2.6	1.5	0.0	0.0	2.0					

99-13

NOTICE OF D)SAGREEMENT DATE 05/05/83 PAGE)

DISPOSITION BY REASONS - QUARTERLY AND CUMULATIVE

FISCAL YEAR 1983 - SOURCE - VARMS (RCS BVA-1<

REG OFF	ALLOWANCE OF BENEFIT SOUGHT 1ST	2ND	3RD	4TH	CUM	CLOSED-FAILURE TO RESPOND TO SOC 1ST	2ND	3RD	4TH	CUM	OTHER REASONS 1ST	2ND	3RD	4TH	CUM
	(% OF TOTAL DISP<					(% OF TOTAL DISP<					(% OF TOTAL DISP<				
	SUBSTANTIVE APPEALS FILED 1ST	2ND	3RD	4TH	CUM						W/D BY CLAIMANT OR REPRESENT 1ST	2ND	3RD	4TH	CUM
	(% OF TOTAL DISP<										(% OF TOTAL DISP<				
JUNEAU	17.6	0.0	0.0	0.0	9.7	35.3	35.7	0.0	0.0	35.3	35.5				5.9
	35.3	42.9	0.0	0.0	38.7						5.9	0.0	0.0	0.0	3.2
WASH DC	1.6	2.2	0.0	0.0	1.9	32.1	40.8	0.0	0.0	36.9					6.4	4.4	0.0	0.0	5.3
	55.6	48.7	0.0	0.0	51.8						4.3	3.9	0.0	0.0	4.1
M'CHSTR	6.5	10.7	0.0	0.0	8.7	29.9	27.9	0.0	0.0	28.6					7.8	6.0	0.0	0.0	6.8
	53.2	56.0	0.0	0.0	54.7						2.6	0.0	0.0	0.0	1.2
SANDIEGO	3.8	6.1	0.0	0.0	5.9	35.9	36.6	0.0	0.0	36.2					5.6	5.7	0.0	0.0	5.7
	47.6	45.9	0.0	0.0	46.8						5.2	5.7	0.0	0.0	5.5
TOGUS	2.8	0.9	0.0	0.0	1.8	34.9	39.1	0.0	0.0	37.1					1.9	0.9	0.0	0.0	1.4
	54.7	57.4	0.0	0.0	56.1						5.7	1.7	0.0	0.0	3.6
WRJCT	2.0	12.2	0.0	0.0	7.1	38.6	32.7	0.0	0.0	35.7					4.1	4.1	0.0	0.0	4.1
	51.0	51.0	0.0	0.0	51.0						4.1	0.0	0.0	0.0	2.0
FTHARISN	4.0	7.3	0.0	0.0	5.3	31.7	19.5	0.0	0.0	27.0					7.5	6.5	0.0	0.0	7.1
	56.8	60.2	0.0	0.0	58.1						0.0	6.5	0.0	0.0	2.5
FARGO	0.0	0.0	0.0	0.0	0.0	34.6	42.3	0.0	0.0	37.7					0.0	3.8	0.0	0.0	2.6
	61.5	51.9	0.0	0.0	55.1						3.8	1.9	0.0	0.0	2.6
SIOUXFLL	3.1	3.2	0.0	0.0	3.2	36.1	39.8	0.0	0.0	37.9					3.1	0.0	0.0	0.0	1.6
	57.7	57.0	0.0	0.0	57.4						0.0	0.0	0.0	0.0	0.0
CHEYENNE	6.9	10.5	0.0	0.0	9.0	34.5	31.6	0.0	0.0	32.8					0.0	0.0	0.0	0.0	0.0
	48.3	47.4	0.0	0.0	47.8						10.3	10.5	0.0	0.0	10.4
WICHITA	0.3	3.8	0.0	0.0	1.4	53.1	17.7	0.0	0.0	42.1					10.1	8.6	0.0	0.0	9.6
	36.1	69.2	0.0	0.0	48.4						0.3	0.8	0.0	0.0	0.5
SANJUAN	0.3	0.9	0.0	0.0	0.6	15.5	14.5	0.0	0.0	15.0					2.0	7.6	0.0	0.0	5.1
	82.2	77.1	0.0	0.0	79.3						0.0	0.0	0.0	0.0	0.0
WILMGTON	8.6	11.1	0.0	0.0	9.8	22.4	20.4	0.0	0.0	21.4					0.0	5.6	0.0	0.0	2.7
	69.0	63.0	0.0	0.0	66.1						0.0	0.0	0.0	0.0	0.0
TOTAL	5.7	5.8	0.0	0.0	5.7	33.5	34.6	0.0	0.0	34.0					4.8	4.7	0.0	0.0	4.8
	53.7	52.4	0.0	0.0	53.0						2.3	2.6	0.0	0.0	2.4

99-14

QUESTIONS PRESENTED

1. Is there a deprivation of property within the meaning of the Due Process Clause of the Fifth Amendment to the Constitution of the United States when the Veterans Administration denies a disabled veteran's claim for disability benefits under 38 U.S.C. §§ 310-13?

2. Does 38 U.S.C. § 3404, which limits to $10.00 the fee a retained attorney may receive for consulting with a veteran, or for preparing, presenting, and prosecuring the claim of a veteran seeking disability benefits under laws administered by the Veterans Administration, deprive veterans of property without due process of law, because a veteran is entitled to the procedural protection of retained counsel in unreviewable proceedings before the Veterans Administration?

3. Does 38 U.S.C. § 3404, as described above, deprive veterans of liberty without due process of law because the $10.00 fee limitation arbitrarily and capriciously prevents a veteran from availing himself of a statutorily granted right to retain counsel?

4. Does 38 U.S.C. § 3404, as described above, deprive veterans of equal protection of the laws as guaranteed by the Due Process Clause of the Fifth Amendment to the Constitution of the United States, because applicants for benefits before other agencies of the United States Government are not similarly prevented by fee limitations from retaining counsel to assist them?

5. Did the District Court improperly refuse to receive evidence offered by appellant at the trial of his action, which evidence would have tended to prove that private veterans' organizations and their lay persons do not provide adequate representation at hearings of the Board of Veterans Appeals to review denials of applications for "service-connected" disability benefits?

VETERANS OF FOREIGN WARS
OF THE UNITED STATES
211 MAIN STREET • VETERANS SERVICE
• SAN FRANCISCO, CA 94105

May 26, 1982

Mrs. Doris J. Wilson
4833 Boyd Drive
Carmichael, CA 95608

RE: Wilson, Stanley
XC 14 992 808

Dear Mrs. Wilson:

This is in reference to the notification of your personal appearance before the Rating Board on Wednesday, June 2, 1982 at 1:30 p.m.

Please visit our office located on the twelfth floor, room 1209, approximately 30 minutes before your scheduled appearance so we may discuss your claim before the hearing.

If you are unable to keep this appointment, please advise this office at (415) 495-6955.

SINCERELY,

/s/ J. Collier

JACK A. COLLIER
Department Service Officer

JAC:mbk

BOARD OF VETERANS APPEALS
INFORMAL HEARING PRESENTATION

Hearing held in Board Room, BOARD OF VETERANS APPEALS, Veterans Administration, Washington, D.C., April 13, 1983.

Veteran represented by:
Dr. Maurine Johnson, Disabled American Veterans

QUESTIONS AT ISSUE:;

1. Service connection for carcinoma of the lung.
2. Service connection for pneumonectomy.

DR. JOHNSON: This veteran served in the Armed Forces from 1950 until 1974—about 24 years. He had a history of colds and some chest pain periodically during the time of his service. The veteran had an X-ray done in 1975 which showed a 3-millimeter density in his right upper lung field which was followed and did not show any change. He subsequently developed the problem in his left base which appeared to be pneumonitis; then he developed a mass and atelectasis. A diagnosis of epidermal carcionoma of the left upper lung was made and the veteran had a pneumonectomy done in 1979. The veteran feels that his disease started in the service because of his chest symptoms. His chest X-rays did not show any signs of any tumor in the service. The man did have symptoms but we ought to point out that he was smoking anywhere from 4 to 2 packs of cigarettes a day and I am sure that this was causing his shortness of breath, his discomfort, his general malaise on occasions. I'm not prepared to say whether or not this man had this cancer in his lung when he was discharged in the service or not. We have learned over the years that individuals have tumors and they grow very very slowly for a long time and in the last few months before the diagnosis they blossom out; this is usually too late. This could very well be this man's case. We know that some of these tumors go for 4, 5, 6 years and over before they are diagnosed finally when the individual gets symptoms. This man has plenty of reason to have carcinoma in view of his history and overall picture. We hope the Board will consider this in reviewing this case, especially since we really don't know the cause of

these cancers and we feel they are due to cigarettes; we certainly don't know the rate at which they grow. They vary in length of time in the literature. This is not a matter of 10 or 20 years, this is only a matter of a little over four years when he finally dame down with a full-blown carcinoma.

U.S. DEPARTMENT OF JUSTICE
UNITED STATES ATTORNEY
NORTHERN DISTRICT OF CALIFORNIA

July 15, 1983

Gordon Erspamer
MORRISON & FOERSTER
Spear Street Tower
One Market Plaza
San Francisco, California

Re: NARS

Dear Mr. Erspamer:

This letter responds to your request for supplementary response to your interrogatories as well as other outstanding discovery requests.

When we responded in answer to a number of interrogatories that information was "not readily accessible" we meant that only a manual review of the files in question would lead to an answer. Thus, for example, with respect to interrogatory number 2 there is no other way to know whether an attorney represented someone as opposed to an agent. (Attached hereto is Form 2-22a, the Power of Attorney Form which is used in both situations.) Only by looking at the boxes in square 8 can it be determined that an agent, as opposed to any attorney, provided the representation. Furthermore, when one type of representative replaces another only the more current power of attorney is retained in the file so the earlier representation could be underterminable except through reviewing correspondence. Also attached hereto is a blank Veterans Administration "C file". You will note that no information is placed on the exterior so that a manual review of each file means that each file would have to be opened and examined to determine present representation. Past representation would be more burdensome and less exact because a former power of attorney would not be present. Also attached is the form used to designate a service representative.

The same manual examination of files applies to interrogatories 3, 4, and 5.

manual review of claims folders. Our limited resources do not permit this type of review.

Interrogatory No. 15(a)—Richard B. Stendefer, Deputy Vice Chairman, Board of Veterans Appeals, is the most knowledgeable individual at the BVA with respect to death and disability compensation claims based on alleged exposure to nuclear radiation during atomic bomb tests. Mr. Standefer also is most knowledgeable in cases involving alleged exposure to toxic chemicals and in cases of alleged post-traumatic stress syndrome caused by wartime service.

Interrogatory No. 17—The BVA has limited information on which to base responses to this interrogatory. From cases in which BVA decisions have been entered, we are able to provide following information:

For fiscal year 1976 our records show that 3,021 appellants whose appeals involved disability compensation had formal hearings before a rating board in a field station after a notice of disagreement had been filed. This accounted for 14.4 percent of such claims. There were 130 hearings for appellants in death compensation cases. This accounted for 5.9 percent of such claims.

For fiscal year 1977 BVA records show that 3,072 appellants whose appeals involved disability compensation had formal hearings before a rating board in a field station after a notice of disagreement had been filed. This accounted for 12.6 percent of such claims. There were 152 hearings for appellants in death compensation cases. This accounted for 8.5 percent of such claims.

For fiscal year 1982 BVA records show that 8,140 appellants whose appeals involved disability compensation had formal hearings before a rating board in a field station after a notice of disagreement had been filed. This accounted for 29.1 percent of such claims. There were 370 hearings for appellants in death compensation cases. This accounted for 20.6 percent of such claims.

Data for other years are not available.

Interrogatory No. 17(a) To the best of our knowledge and belief, every appellant who requests a personal hearing at the BVA level has one. Such a request can be terminated only by the appellant or representative.

Interrogatory No. 17(a)—Including hearings before traveling sections of the BFA, we are able to provide the following information on personal hearings before the BFA:

	1976	1977	1982
Death Comp Cases	2196	1789	1792
Personal Hearings	67	67	85
Rate	3.1%	3.7%	4.7%
Number Allowed	12	19	16
A;;pwamce	18.9%	28.4%	18.8%
Disab Comp Cases	20982	24291	27997
Personal Hearings	675	1188	1629
Rate	3.7%	4.9%	5.8%
Number allowed	149	237	388
Allowance Rate	22.1%	19.9%	23.8%

Data are not available for other years

Interrogatory No. 17(b)—Records of the BFA show the following numbers and percentages of appellants in death and disability compensation cases in which personal hearings were not requested at the BVA level:

Death Comp Cases	2196	1789	1792
No BVA Hearings	1758	1713	1707
Rate	80.1%	95.8%	95.3%
Number Allowed	244	228	159
Allowance Rate	13.9%	13.3%	9.3%
Disab Comp Cases	20982	24291	27997
No BVA Hearings	20602	23984	26368
Rate	98.2%	98.8%	94.2%
Number Allowed	2699	3025	3487
Allowance Rate	13.1%	12.6%	13.2%

Data are not available for other years

Interrogatory No. 18—The BVA can provide a limited amount of information on abandoned or withdrawn claims. We have no breakdown by category of appeal. Since death and disability compensation claims account for more than three-quarters of all appeals, the data might be meaningful.

Interrogatory No. 18(a)—Unknown

Interrogatory No. 18(b)—Unknonw

VETERANS ADMINISTRATION

STATEMENT OF ACCREDITED REPRESENTATIVE IN APPEALED CASE

1009

TO	SERVICE ORGANIZATION (Name and mail routing symbol) VFW	DATE
	LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN [redacted]	FILE NO. [redacted]

All evidence in connection with this appeal has been considered. Please complete and return the statement below on or before the date indicated. If we not receive either the statement or a request for extension by that date, it will be necessary for us to certify the appeal to the Board of Veterans Appeals on the present record.

REPLY REQUESTED BY (Date)	ORGANIZATIONAL ELEMENT MAKING REQUEST (Name and mail routing symbol)
JULY 14	214

TO BE COMPLETED BY ACCREDITED REPRESENTATIVE

NOTE: Section 3005(a) and (b)(2), Title 38, United States Code, gives the claimant the right to be represented and gives the accredited representative the right to file claims for the claimant. The presentation of an argument by the accredited representative is voluntary, and not necessary for completion of the appeal. The opportunity for argument is given the accredited representative in order to accord the claimant the right of full representation at this stage of the appellate process. Failure to file this form may delay the appellate process.

I HEREBY CERTIFY that a statement of the case was furnished, that appellate review is desired on the evidence now of record, and that the issues for consideration of the Board of Veterans Appeals are clearly defined.

☐ I REST THE APPEAL ON THE ANSWER TO THE STATEMENT OF THE CASE AND THE HEARING ON APPEAL (If conducted).

☒ I WISH TO MAKE THE FOLLOWING ARGUMENT TO SUPPLEMENT THE ANSWER TO THE STATEMENT OF THE CASE AND OTHER ARGUMENT OF RECORD:

THE VETERAN CONTENDS THAT ALL THE DISABILITIES SHOWN IN THE STATEMENT OF THE CASE DATED 6-22-82 IS THE RESULT OF AGENT ORANGE EXPOSURE WHILE IN VIETNAM BETWEEN SEPTEMBER 1, 1967 AND AUGUST 30, 1968

Pltf Exhibit 153
Date 7/8/85
Wit T. Vetell
Carolyn M. Wilson, CSR 4913

(ATTACH ADDITIONAL SHEETS, IF NECESSARY)

SIGNATURE AND TITLE OF REPRESENTATIVE	DATE
[signature]	7-8-82

VA Form OCT 1975 1-646 EXISTING STOCKS OF VA FORM 1-646, JUL 1965, WILL BE USED.

AU4290

12/1/81 ... 807 section chief ... 1006

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

SOCIAL SECURITY [redacted]

VA FILE NO. [redacted]

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (c)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information solicited may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)

[redacted]

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

To Whom it may concern:

In June 1977 I quit my job with Dr. R. A. Hoffman as an optician because I could no longer take public contact nor the nightmares. I had constant headaches and could not think or work with them.

After 4 attempts at taking my life, I knew that I either had to leave or if I did not leave I knew that I would either kill myself or someone else. Between the nightmares and the tricks my mind was playing on me with at times believing I was back in Nam. I quit and started running. To date I have been unable to work since that time.

Any medical information required can be obtained from the Livermore VA Medical center as I am currently under treatment at that facility.

Plf's Exhibit 154
Date 7/8/83
Wit J. Verrill
Carolyn M. Wilson, CSR 4913

CONTINUE ON REVERSE

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED 12/9/81

SIGNATURE [redacted]

ADDRESS 532 Mary Todd Lane, Modesto, CA. 95354

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1976 21-4138 EXISTING STOCKS OF VA FORM 21-4138, JUL 1977, WILL BE USED.

U.S. GOVERNMENT PRINTING OFFICE 1980—341-465/4169

AU4248

(473) (1007)

Form Approved
OMB No. 76-R0139

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

VA FILE NO. [redacted]

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME-MIDDLE NAME-LAST NAME OF VETERAN (Type or print)

[redacted]

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I was treated for Asthma while stationed at Chelsea Naval Hosp. Chelsea Mass. also I was treated for arthritis of the hands while at the Naval Medical Center at N N M C. Bethesda, Md I was treated for sinusitis while at MCAF El Toro Ca also ~~I have~~ ~~[illegible]~~ ~~[illegible]~~ ~~[illegible]

I174
1008

23 AUG '82

[redacted]

Mr. [redacted]
512 Bass Drive
Vacaville, CA 95688

We have checked with the Department of Energy as to whether there is a record of radiation exposure for you during the years 1964 and 1965. They have been unable to find any record of radiation exposure for you. However, in similar cases it has been disclosed that only minimal exposure, if any, had been experienced and no justification has been established for associating such exposure with disabilities, at remote dates. We also have no medical records to support your claim.

We are sorry our decision could not be favorable. If you have any evidence which you feel should be considered, please let us know. We will be happy to review it.

For Adjudication Officer

Enclosure:
VA Form 1-4107
cc:
Disabled American Veterans

21B2
C MR 120C

Plfs. Exhibit 173
Date 7/11/83
Wit I. Verril
Carolyn M. Wilson, CSR 4013

EXHIBIT NO. 177

(009)

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

SOCIAL SECURITY NO. [redacted]

VA FILE NO. C- [redacted]

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

[redacted] OF VETERAN (Type or print)

The following [redacted] in connection with a claim for benefits in the case of the above-named veteran:

I Wish to File a Claim for Service Connection, for lung Problems
My Problem did not start until I was out of service; However I have been Exposed to the Herbicides and defolant While on active duty in Viet Nam, and my problem started shortly out of service and there is no History of this Problem in my Family nor did I have this Problem prior to entering into service.
I Contend this is a Result of something While I was in the service, and Could be awarded service connection on a presumptive basis.
Presently I am being seen at the VA O.P.C. in Sacramento Ca.

(CONTINUE ON REVERSE

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED 4-20-83

SIGNATURE [redacted]

ADDRESS [redacted]

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1976 21-4138

EXISTING STOCKS OF VA FORM 21-4138, JUL 1977, WILL BE USED.

122-35

EXHIBIT NO. 178

~~178~~ 1010

Form approved
Budget Bureau No. [illegible]

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

NOTE.--If additional space is needed, use reverse.

CLAIM NO.

LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)

[redacted]

C- [redacted]

The following statement is made in connection with a claim for benefits in the case of the above named veteran:

Re: Informal claim for service connection for residuals of pneumonia incurred while in service:

I request that the attached medical statement be considered and that my claim be reopened and that service connection be granted for such conditions as shown by medical report.

I CERTIFY that the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED	SIGNATURE
23 Feb 72	SIGN HERE ▶ [redacted]

ADDRESS [redacted]

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM JAN 1967 21-4138

EXISTING STOCK OF VA FORM 21-4138, JAN 1963, WILL BE USED.

* GPO : 1967 O - 252-192 (219)

178 - 76

EXHIBIT NO. 180

COPY

Pet's Exhibit 180 for Ident. (180)
Witness Jacobson
Reporter - R. A. WALKER
Date 10/21/83
(1011)

VETERANS ADMINISTRATION

APPOINTMENT OF VETERANS SERVICE ORGANIZATION AS CLAIMANT'S REPRESENTATIVE

1. LAST NAME - FIRST NAME - MIDDLE NAME OF VETERAN [redacted]

2. VA FILE NO. (Include prefix) [redacted]

3. NAME OF SERVICE ORGANIZATION RECOGNIZED BY VETERANS ADMINISTRATION (See list on reverse side before selecting organization)

Disabled American Veterans

ack 9-5-79 L

4. SOCIAL SECURITY NO. [redacted]

5. INSURANCE NO(S). (Include letter prefix)

6A. SERVICE NO(S). [redacted]

6B. BRANCH OF SERVICE U.S. Army

INSTRUCTIONS – TYPE OR PRINT ALL ENTRIES

7. NAME OF CLAIMANT (If other than veteran)

8. RELATIONSHIP (If other than veteran)

9. ADDRESS OF CLAIMANT (No. and street or rural route, city or P.O., State and ZIP Code)

~~RT. 1 Box 119~~ 4125 Oasis Rd
~~Cave, Oregon 97824~~ Redding Ca 96001

10. DATE OF THIS APPOINTMENT 17 April 1979

NOTE: Complete Items 11A and 11B only if claim filed for disability insurance benefits.

11A. TYPE OF DISABILITY INSURANCE BENEFITS FILED FOR

☐ NSLI ☐ USGLI ☐ NSLI AND USGLI

11B. LOCATION OF INSURANCE RECORDS

☐ PHILADELPHIA ☐ ST. PAUL

I hereby appoint the above-named service organization as my representative to present my claim before the Veterans Administration for all benefits to which I may be entitled or become entitled by virtue of the service of the above-named veteran under the laws administered by the Veterans Administration and to receive any information from the Veterans Administration in connection therewith.

The accredited representative (check one) ☒ is authorized, ☐ is not authorized to disclose information necessary in the development of my claim to the local organization named below.

NAME AND ADDRESS OF CHAPTER, POST OR UNIT

Cow Palace Dept of Chapter in USA.

VA USE ONLY	VA FORM 23-22a SENT TO	DATE SENT	ACKNOWLEDGED (Date)	REVOKED (Reason and date)
	☐ R&E FILE ☐ INSURANCE FILE ☐ DEA FILE ☐ LG FILE		9-5-79	

It is understood that no fee or compensation of whatsoever nature will be charged me for service rendered pursuant to this power of attorney and that this power of attorney may be canceled by me, or by the service organization named, on written notice to the Veterans Administration.

SIGNATURE OF CLAIMANT

X [redacted]

PROTECTION OF PRIVACY NOTICE

Authority - The information solicited on this form is requested under Section 3402 of Title 38 U.S.C. which provides for the recognition of representatives of certain organizations in the preparation, presentation and prosecution of claims under laws administered by the Veterans Administration; such representatives, upon appointment of claimant, may act for him or her and become entitled to information under provisions of 38 U.S.C. 3301(b).

Purpose - To provide authority for representation by recognized Veterans Service Organizations.

Use - The information will be used to identify your records. The information may be disclosed outside the Veterans Administration as permitted by law.

Effects of Non-Disclosure - Disclosure of requested information is voluntary; however, failure to furnish the information would impose administrative difficulties which may result in a delay in identifying your records and/or in a delay in the appointment of the named organization as your representative.

NOTE: As long as this appointment is in effect, the organization named herein will be recognized as the sole agent for presentation of your claim before the Veterans Administration in connection with your claim or any portion thereof.

THIS POWER OF ATTORNEY DOES NOT REQUIRE EXECUTION BEFORE A NOTARY PUBLIC.

VA FORM MAR 1978 23-22. EXISTING STOCKS OF VA FORM 23-22, OCT 1974, WILL BE USED.

CLAIMS FOLDER

180-1

(1+84)

Form Approved
OMB No. 76-R0333

1012

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

SOCIAL SECURITY NO.	VA FILE NO.
[redacted]	C[redacted]

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print)
[redacted]

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I participated in three of thies shots. I was called out on several mor but they were calle doff for some reason(Wind changes or equipment falure.)

I was also a special guard foll air transportability" to transport natural to other laboritorys. in other locations.

I was also at antiwetok atoll for the "H" bomb shots. This was in 1956. Altho I was not directly involved with the shots I was on guard duty there. Myself, along with otheas of my company went swimming and ate fosh that came from the waters around that area. I do not know the exact date distance we were from the test shot. However; I was not among the forward observers.

I had open Heart surgery at the Veterans Hospital in Sanfransisco in Sept. 20, 1973. I have been Hospitalized several times since that date I don't remember all the times or Dates My VA file # is 550-44-3413 8670528S I was last Hospitalized at Sam Jacksons VA. Hospital in Portland Oregon in 1979.

(CONTINUE ON REVERSE)

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED	SIGNATURE
5/30/1980	[redacted]

ADDRESS [redacted]

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1978 21-4138

EXISTING STOCKS OF VA FORM 21-4138, JUL 1977 WILL BE USED.

180-44

(1182)
(1013)

Form Approved
OMB No. 76-R0333

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

SOCIAL SECURITY NO. [redacted]

VA FILE NO. C- [redacted]

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME-MIDDLE NAME-LAST NAME OF VETERAN (Type or print)
[redacted]

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

DEAR SIR.

I was at "Desert Rock Nevada" for the :a!" bomb shots in 1954-55.

I did not take notes or keep a journal. Any indication of note takeing would have been delt with accordingly. Due to the two strokes and some other heart damage, I don,'t remember the exact dates of the shots or the code names of the shots. My company was in charge of security and traffic controll. We were under (strict security control and still are as far as I know.)

My company was the 505th. military police company. We were sent there from the Presidio of San Francisco. We were part of the sixth army.

I can not give youbthe full discriptions of my work there, but I will give you all the duty thet pertains to Radiation exosupe.

At each shot the men detailed to control traffic would be picked up by open jeep and transported to the tes area. We were then left on a check point untill all the Marines were ed by bus and were deposited in to the trenches. When the count down began the "M.P." would go the trench untill the all clear whistle sounded. After the all clear whistle the "M.P." returned to his post. assisted in the loading of the busses the waited untill all personell had cleared the area. After the area had been cleared an open top jeep would arrive and take the "M.P." back to his quarters.

The loud speeker said that we were 1500 yards from the blast area. This test site was used more than once. ~~over~~ next page

(CONTINUE ON REVERSE)

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED	SIGNATURE

ADDRESS

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1976 21-4138

EXISTING STOCKS OF VA FORM 21-4138, JUL 1977, WILL BE USED.

180-46

Form Approved
OMB No. 76-R0114

FILE NO.

STATEMENT IN SUPPORT OF CLAIM

If additional space is needed, use reverse.

NAME - FIRST NAME - MIDDLE NAME OF VETERAN (Type or print)

[redacted]

The following statement is made in connection with a claim for benefits in the case of the above named veteran:

I had open heart surgery on Sept 25, 1973 Since then I have tried to work and support my family. I can not do it. My income tax for 1974 shows $3427.42 It is to support myself, my wife, and five children. I have two children living in Eureka and I am supposed to be paying child support payments. I am not paying them and do not have the money.

I am not capable of working in my occupation of timber and Logging Industry. Since then I have been trying to do light work, but I can do just a little, then I am laid again. The valves in my heart evidently blood clots and I am Taking iron tablets to help this condition. I am employable. I can only get a job with my medical history and I am incapable of doing heavy work. In the two years since the surgery I have sincerely tried to support myself + my family. Now we are on the verge of Bankruptcy. We have no income and we have bills and collectors calling me Long Distance the situation is this. We are quite Lost at all. We are applying for welfare + food stamps. our

I CERTIFY that the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED	SIGNATURE
JUNE 30 1975	SIGN HERE ▷ [redacted]
ADDRESS [redacted]	

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false

VA FORM 21-4138 EXISTING STOCK OF VA FORM 21-4138, JAN 1967, WILL BE USED.

180-88

EXHIBIT NO. 181

Witness [illegible]
Reporter - B. A. WALKER
Date 10/21/83

(485)

(1015)

REFERENCE SLIP

TO (Name or title—Mail routing symbol)	INITIALS-DATE
1. Director (21) VA Regional Office	
2. San Francisco, California	
3.	
4.	
5.	

REASON FOR REFERENCE

- [X] AS REQUESTED
- [ ] COMMENTS
- [ ] CONCURRENCE
- [X] FOR YOUR FILES
- [ ] INFORMATION
- [ ] NECESSARY ACTION
- [ ] NOTE AND RETURN
- [ ] PER CONVERSATION
- [ ] SIGNATURE

REMARKS

SUBJ: Radiation Exposure

Attached is radiation data regarding the subject veteran, requested by your office on

Max R. Woodall

FROM: MAX R. WOODALL, Director
Compensation & Pension Service (21)

DATE: 6/1/83

TEL. EXT.: 389-398

VA FORM MAY 1980 3230 EXISTING STOCKS OF VA FORM 3230, AUG 1976, WILL BE USED.

(81-1)

1016 ~~H86~~

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

SOCIAL SECURITY NO. [redacted] VA FILE NO. [redacted] C- [redacted]

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant and necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME-MIDDLE NAME-LAST NAME OF VETERAN-(Type or print) [redacted]

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

Prior to service, Student. During 20+yrs service
Prior to Pilot, Enlisted to Warrant Entered service
Jan 1945 after Brief trg. shipped to Okinawa. Discharged
July 1946 Re-entered Jan 47 Brief schooling and
shipped Korea, Returned to Ft Benning Ga. Late 49.
Entered Airborne in 1950, Returned Korea 1952.
Returned Ft Lewis Wa. Late 53 (Mid 1954 Unit
shipped Co. Desert Rock Nevada 9+ mo. unit
shipped Ft Ord, Ca. (94th ENG. BTN. ?) I then went
to Helicopter Pilot Trng. Graduated Dec. 1955.
Stationed Ft. Huachuca, Az. 1958 Returned to Korea
59 Back to Alabama Flight Trng. 1961 Left service
for 2+ yrs. Returned in 1963 Shipped to Germany.
1965 Shipped to Viet Noum, 1966 Back to Germany.
1968 Retired. During 1954-55 Co. Desert Rock. Atomic
radiation exposure. Duties 1st Sgt. of unit, Construct
trenches, Fortifications & etc. for long term. Many
visits to area of previous tests. My Viet Noum tour
1965-66 Numerous search & destroy missions carried
out in areas of agent Orange defoliant sprayed.
Varied from several wks to several day prior. (CONTINUE ON REVERSE)

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED 7-2-82 SIGNATURE ~~Richard H Schweitzer~~

ADDRESS ~~P.O. Box 989 Marysville, Ca 95901~~

PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1978 21-4138

EXISTING STOCKS OF VA FORM 21-4138, JUL 1977, WILL BE USED.

181-19

participants. Members of unit on a (1017) voluntary basis were permitted into trench area. I did or I believe it was 2 miles from tower.

At ~~no~~ any time during the 9 mo. period 1954-55 were we told or even alerted of any danger, As a unit or on an individual basis.

The Only name I can recall was my C.O. Capt John M Golosie (Sacramento, Ca.)

Treatment directly relating to radiation No Not to my knowledge.

In the past 4.½ yrs. I would say I ha ben exposed above average, Due to health reasons. There have ben quite a number of X rays.

I do not smok any more. ~~Quit~~ But its hazardous to oyer health, they tell m Personaly I am getting confused Dont kno whom to believe.

RECEIVED AUG 3 1982 CALIF.

181-20

VETERANS ADMINISTRATION

STATEMENT IN SUPPORT OF CLAIM

SOCIAL SECURITY NO. [redacted]

VA FILE NO. [redacted]

PRIVACY ACT INFORMATION: The information furnished on this form is authorized by existing law (38 U.S.C. 210 (C)(1)) and is considered relevant a necessary to determine entitlement to maximum benefits applied for under the law. The information submitted may be disclosed outside the Veterans Administration only as permitted by law.

FIRST NAME - MIDDLE NAME - LAST NAME OF VETERAN (Type or print) [redacted]

The following statement is made in connection with a claim for benefits in the case of the above-named veteran:

I was assigned to unit as 1st Sgt "C" Co 95th Eng. Bn. Unit was transferred from Ft. Lewis Wash. to Camp Desert Rock Nevada Sept ~~1954~~ 1954 until June 1955

The units mission, to construct a typical combat fortification, Dig trenches etc. for Bomb testing. During the 9 months assigned at Cp. Desert Rock. Visits to construction sit were ~~on~~ weekly along with C.O. During these visits were made to farmers home test sites, as close as 1 mile of ground "0" Hour time unk. Duration of visits never more than 30 min. Not too much to see Glass imbeded in wall & doors of refrigerators & other appliances Dummies imbeded into walls of trailer houses. Some areas visited, sand had turned to glass from the Fallout Bodies were spray by all members of Unit. Film was changed routinely, I can not remember if weekly or by-weekly. I believe I Badge was tested while we were stationed at Cp. Desert Rock. But we were not direct

(CONTINUE ON REVERSE)

I CERTIFY THAT the foregoing statements are true and correct to the best of my knowledge and belief.

DATE SIGNED 4-2-82

SIGNATURE [redacted]

ADDRESS [redacted]

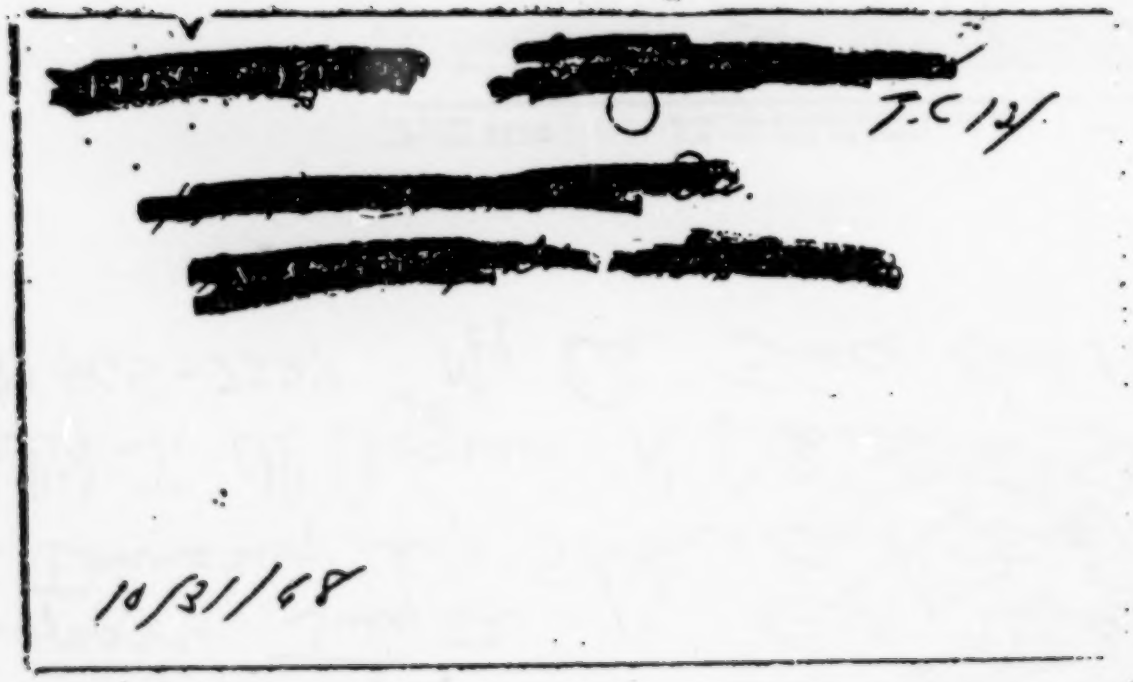
PENALTY - The law provides severe penalties which include fine or imprisonment, or both, for the willful submission of any statement or evidence of a material fact, knowing it to be false.

VA FORM FEB 1978 21-4138

EXISTING STOCKS OF VA FORM 21-4138, JUL 1977, WILL BE USED.

U.S. Government Printing Office 1981—341-465/4593

181-21



181-33

Cont.

During my Pacific Tour 1945-46 I contracted (1020)
Malaria; No serious problem. During Korea
tour 1953 ReOccured hospitalized 3 days severe
chills & high temp. Then every year or so for
about 8 yrs. during summer would have minor
reoccurance

Atomic Radiation 1954-55 exposure unk. Was
never informed. During the 9 mo. period we
wore Badges (Geometers?) They were replaced
weekly or bi weekly.? Our mission, Construct
military combat situation for Atomic test.

Heart problem 1968 Schweinfurt Hall. West Germany
Not hospitalized given E.K.G. local disp. & released.
After retirement continued to fly Helicopters. Sept
1972 Heart attack. Mark Twain Hosp. San Andreas, Ca.
Oct 77 V.A. Hosp. Temple Texas Dec 77 St. Joseph's
Hosp. Stocton, Ca. Jan 78 V.A. Palo Alto Surgery
Dbl. Bypass. July 82 " " Scan
Apr 82 Dameron Hosp. Stocton = Heart Stress Scan,
Dr. Walid J. Al Azzawi N. Elbarado St. Stocton
Ph. (209) 465-7227 My Dr. Since Nov. 1977.

Veterans Administration

REFERENCE SLIP

(1021)

TO (Name or title—Mail routing symbol)	INITIALS—DATE
1. Marty Blesky	
2. Veterans Service Officer	
3. 02	
4.	
5.	

REASON FOR REFERENCE

- ☐ AS REQUESTED
- ☐ COMMENTS
- ☐ CONCURRENCE
- ☐ FOR YOUR FILES
- ☐ INFORMATION
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ PER CONVERSATION
- ☐ SIGNATURE

REMARKS

Plf's Exhibit 194 for Ident.
Witness Jacobson
Reporter - R. A. WALKER
Date 11/2/83

FROM	DATE
JACK NAGAN Asst. District Counsel (02A)	11/3/83
	TEL. EXT. 0228

VA FORM MAY 1980 3230 EXISTING STOCKS OF VA FORM 3230, AUG 1978, WILL BE USED. * U.S. G.P.O. 1983-606-200

194-1

(H93
1022)

623

December 5, 1980

Re: 014C [redacted]

Mr. Dan Forest
Disabled American Veterans
V.A. Regional Office
211 Main Street, Room 1210
San Francisco, Ca. 94105

Dear Mr. Forest:

Due to the lack of a viable representation on the part of the DAV, I am withdrawing my Power of Attorney with your organization as of this date. Would you please acknowledge in writing and forward any pertinent information regarding this claim to the below address.

Notification of this action has been sent to Congressman Robert Matsui, VA Regional Office in San Francisco, and the DAV in Sacramento.

Sincerely,

194-58

(1194)
(1023)

624

December 12, 1980

Re: 342-21[redacted]

Mr. M. H. Tallen
Adjudication Officer
Veterans Administration
211 Main Street
San Francisco, Ca. 94105

Dear Mr. Tallen:

As stated in the attached letter, I am hereby withdrawing my Power of Attorney to the DAV and will take over the responsibility of processing my claim. Because of the lack of action on the case, I would like an audience with you at your earliest convenience to discuss the status of my claim and what is needed to process it to a successful conclusion.

The disability claim has been in apparent limbo for the past nine months waiting for medical records from Mather AFB. Upon checking with Mather officials, I found that no request for medical records had been received from the VA and no follow-up had been initiated. On Friday, the fifth of December, I signed a medical record release and the required records were forwarded to your office the same day.

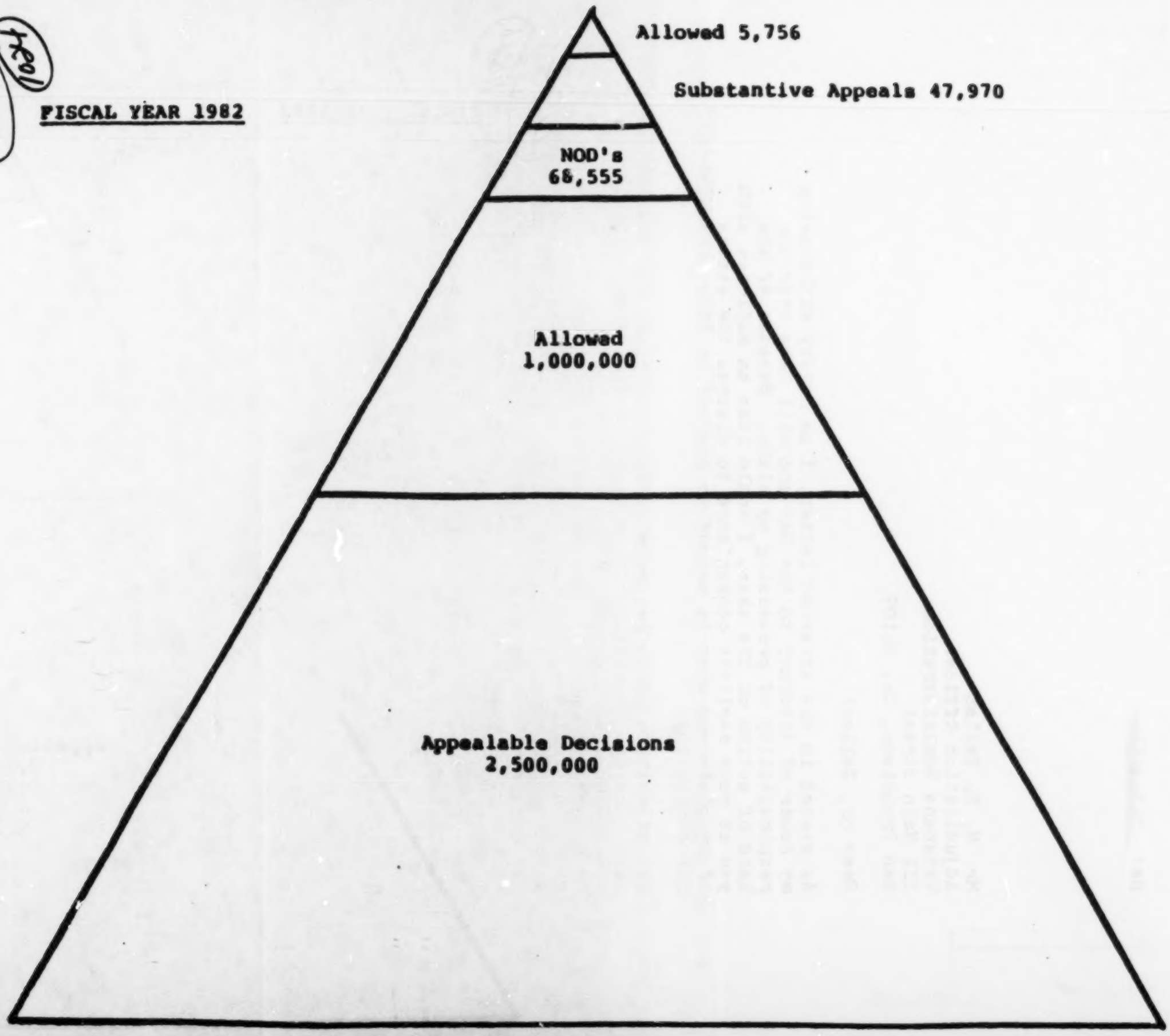
These records should help to renew action on my stalled disability claim and I am looking forward to discussing these matters with you in the near future.

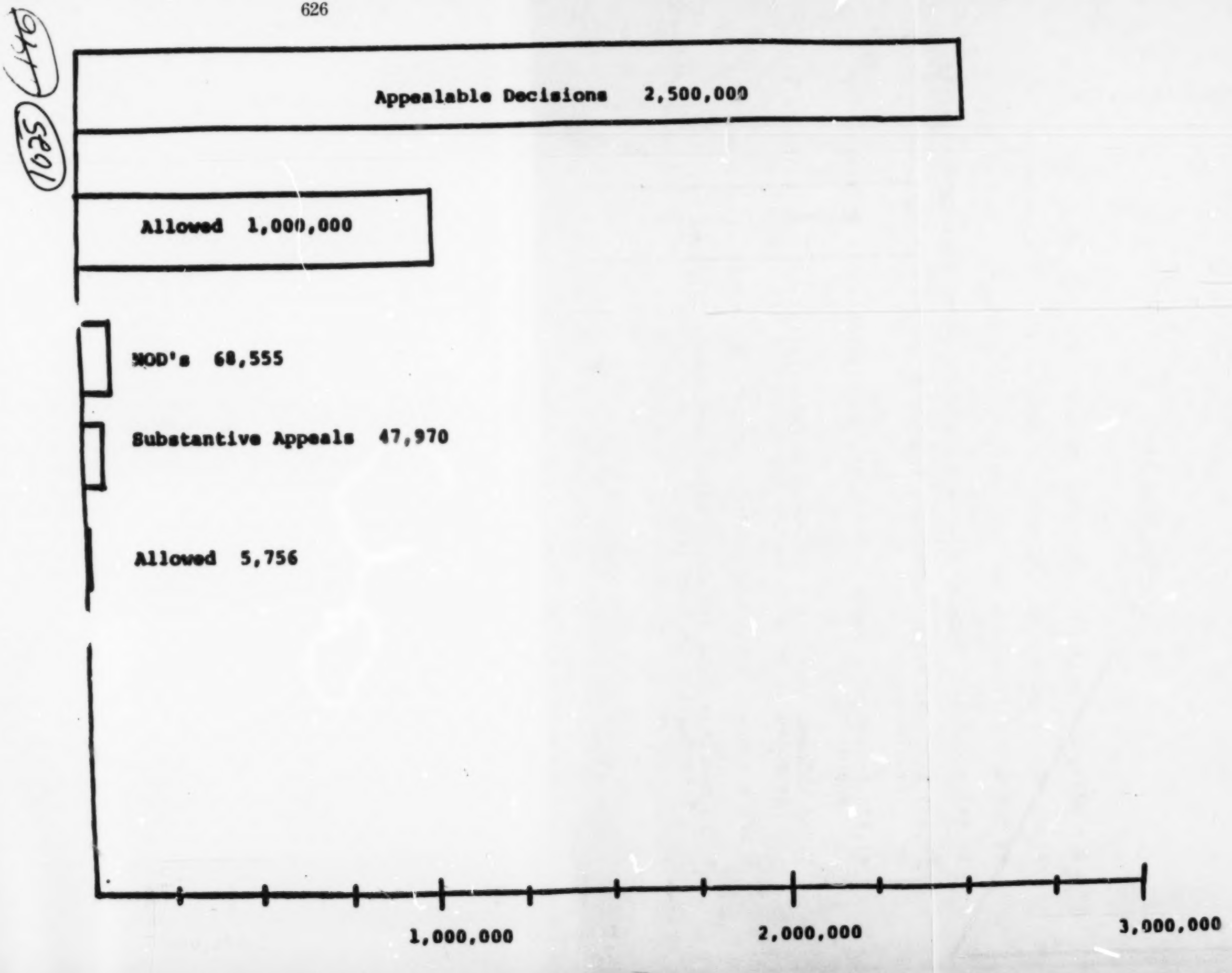
Sincerely,

194-59

EXHIBIT A

FISCAL YEAR 1982




Appealable Decisions 2,500,000
Allowed 1,000,000
NOD's 68,555
Substantive Appeals 47,970
Allowed 5,756
1,000,000
2,000,000
3,000,000

(1197)
(1026)

FISCAL YEAR 1982

2.5 million appealable decisions (Exhibit 70)

1,000,000 Allowed (Ver. 162-164 - approximately 40% allowed)

68,555 NOD's (Veterans Administration's Interrogatory Answer #18)

20,588 Withdrawn (Veterans Administration's Interrogatory Answer #18)

18,852 Hearings Held (Veterans Administration's Supplemental Interrogatory Answer #16)

47,970 Substantive Appeals (Veterans Administration's Interrogatory Answer #18)

5,756 Allowed (Exhibit J to Veterans Administration's February 4, 1982 Response to FOIA Request - approximately 12% allowance)

2,278 Withdrawn (Veterans Administration's Interrogatory Answer #18)

8,510 Hearings Held (Veterans Administration's Supplemental Interrogatory Answer #17)

VETERANS ADMINISTRATION

September 27, 1983

Mr. Mylio S. Kraja
Executive Director
The American Legion
1608 "K" Street, N.W.
Washington, D.C. 20006

Dear Mr. Kraja:

I would like to take this opportunity to advise you and officials of other veterans organizations of a case now pending in the United States District Court for the Northern District of California which I believe you will find as troubling as I do.

The case is captioned *National Association of Radiation Survivors et al.*, v. *Harry N. Walters, et al.*, Civil *Action No. C 83 1861 MHP*, (U.S.D.C. N.D. Cal., April 13, 1983). The plaintiffs in this action are challenging the constitutionality of the provisions of 38 U.S.C. §§ 3404 and 3405 which limit the amount of the fee an attonrey may receive for representing an individual claimant in prosecuting a claim for veteran benefits. The basis for their constitutional challenge is that the statutory attorney fee limitation violates both the substantive and procedural due porocess provisions of the Fifth Amendment of the United States Constitution.

Because of the many decisions that have consistently upheld the constitutionality of the attorney fee limitation, including some by the United States Supreme Court, I must admit that our initial reaction to this case was that it would routinely be dismissed. The court's denial of our motion to dismiss and several adverse rulings on procedural matters, particularly with respect to discovery, however, have made it abundantly clear that this case could proceed much further than we think it should. Extensive discovery has already made it extremely burdensome and expensive for us. Aside from being burdensome, there are two other

aspects to this case which I belive you will agree are particularly troublesome.

The first is the fact that, if the plaintiffs are successful, there will be no restriction on the amount attorneys may charge claimants for representing them before the VA. Obviously, this will create the possibility that the benefits of some VA claimants will be unnecessarily depleted. The other is the plaintiffs' allegation that the free representation provided to VA claimants by representatives of service organizations is inadequate in death and disability compensation claims, especially in complex cases such as those involving radiation, Agent Orange, or post-traumatic stress syndrome issues. I am enclosing copies of some of the pleadings (complaint, our motion to dismiss, and plaintiff's memo in opposition) in which this allegation is discussed. You will note that plaintiffs apparently consider this to be one of their strongest arguments against the attorney fee limitation.

I find this latter aspect particularly troublesome in view of the fine record with respect to representation that service organizations have attained over the years and the crucial role you have played in creating the current informal and supportive claim process. Even more disturbing is the possibility that, because of the wide-spread publicity this case has received in California, some claimants may be persuaded not to take advantage of the free, expert assistance provided by service organizations.

Accordingly, I am requesting your assistance in defending this case. It would be helpful if you would provide us with an affidavit for use in court containing a factual description of your organization, particularly with respect to your representation of VA claimants. The description should include information such as:

a. the number of your claim representatives;
b. the type and extent of their training;
c. the resources available to assist your representatives in representing a VA claimant;
d. the number of claimants represented;
e. the rate of successful representation; and

f. any other information that would demonstrate your organization's capability to provide adequate representation for VA claimants.

I sincerely hope you will assist us in preventing what could develop into a very harmful situation for veterans and their dependents. The handling of this case here in Washington, D.C. is being supervised by Mr. Edward Lukey, Deputy Assistant General Counsel. He would be more than happy to discuss this matter with you or your staff. He can be reached at 389-2440.

Sincerely yours,

/S/ _____

JOHN P. MURPHY
General Counsel
Enclosures

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C 83-1861 MHP
San Francisco, California
Thursday, December 1, 1983

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL., PLAINTIFFS,

v.

HARRY N. WALTERS, ET AL., DEFENDANTS.

REPORTER'S TRANSCRIPT
BEFORE THE HONORABLE MARILYN HALL PATEL, JUDGE

APPEARANCES:

For Plaintiffs:

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For Defendants:

JOSEPH P. RUSSONIELLO,
United States Attorney

GEORGE CHRISTOPHER STOLL,
Assistant U.S. Attonrey
450 Golden Gate Avenue
San Francisco, CA 94102

REPORTED BY: VIVIAN A. PELLA, C.S.R.

[41] THE COURT: Let me ask you this: If they don't make a difference then why does the V.A. have so many attorneys on staff?

[42] MR STOLL: Okay. I think that is a different question. But I'll be happy to address it as we had in our brief.

THE COURT: One would wonder if they don't make a difference why don't they hire persons with a college education that don't have any particular training in law?

MR. STOLL: Well, the attorneys on the staff are serving certain positions in the Veterans Administration, not in all positions, not even necessarily on rating boards, for example, are not attorneys.

THE COURT: How about the legal specialists who sit on the rating board, are those attorneys, generally?

MR. STOLL: No.

THE COURT: Sometimes?

MR. STOLL: A few are. In fact, we ran into one of the few in the regional office who were.

MR. ERSPAMER: I hate to interrupt but I beg to differ on that point I believe until recently they were all attorneys until recent years. And Mr. Jacobsen testified to that. It's not an essential requirement. Some are and some aren't.

MR. STOLL: I can provide the statistics, but in fact it's very few.

THE COURT: Go ahead.

MR. STOLL: Some years ago like it was for F.B.I. agents I believe it was a requirement. It's not true to the [43] present staff. The members of the board of veterans appeals to my understanding there are attorneys, that's true. I think that it is rational to expect that people who are in a final decision-making process which is going to entail writing an opinion and interweaving, but the facts in the law and who are expected to render a correct decision in light of all the V.A. regulations and manuals and the rest of it, that they be people who are very knowledgeable and to require them to be an attorney to be able to interpret all of that I think is not an unreasonable requirement from an employment point of view.

[51] As you know there are slips in those interfacing between one bureaucracy and another.

Mr. Erspamer can point to cases where there was a followup and he can point to cases that were poorly handled either by the Veterans Administration or by the representative or both. I think I can also point to some litigation I've been involved in where presentations on one side or another were not adequate. We can all point to defects in the system. Mr. Erspamer has for some affidavits, some from claimants who claimed that their case was not properly handled and some point out that their claim was not properly handled.

Supreme Court of the United States

No. 84-571

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS', AFFAIRS, ET AL., APPELLANTS,

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court in this case probable jurisdiction is noted.

December 10, 1984

Office - Supreme Court, U.S.
FILED
FEB 13 1985
ALEXANDER L. STEVAS,
CLERK

(9)

Case No. 84-571

SUPREME COURT OF THE UNITED STATES

October Term 1984

HARRY N. WALTERS, Administrator of the Veterans Administration, et al.,

Appellants,

vs.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation, et al.,

Appellees,

and THE AMERICAN G.I. FORUM, a National non-profit corporation,

Intervenor-Appellee.

On Direct Appeal from

The United States District Court for The Northern District of California

Amicus Curiae Brief of Andrew Groza In Support of Appellee

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56 pp

Case No. 84-571

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Table of Contents

Table of Contents . . . . . (i)

Table of Authorities . . . . . (ii)

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I STARE DECISIS IS NOT CONTROLLING 4

II STANDARDS OF CONSTITUTIONAL CONSTRUCTION 6

III VETERANS' HAVE A FIRST AMENDMENT RIGHT TO REDRESS GRIEVANCES 8

IV 38 U.S.C. 3404(c) IMPERMISSIBLY INHIBITS A VETERAN'S CHOICE OF COUNSEL 11

CONCLUSION 20

SIGNATURE 20

FOOTNOTES 20

APPENDIX
MAGNA CHARTA OF 1215

Table of Authorities

CASES

Adams vs. Storey
1 Paine (U.S.) 79,
1 Fed.Case. pg 66 (1817) 7

Bank of United States vs. Deveaux
5 Cranch (9 U.S.) 61,
3 L.Ed. 38 (1809) 7

Barton v. Geiler,
108 U.S. 161, 2 S.Ct. 387,
27 L.Ed. 687 6

Brotherhood of R.T. v. Virginia
377 U.S. 1, 94 S.Ct. 1113, 12 L.Ed.
2d 89, 11 A.L.R.3d 1196 (1964) 9

Butz v. Economou,
438 U.S. 478, 98 S.Ct. 2894,
57 L.Ed.2d 895 (1978) 22

California Motor Transportation Co.
v. Trucking Unlimited,
404 U.S. 508, 92 S.Ct. 609,
30 L.Ed.2d 642 (1972) 9

Dred Scott v. Sanford
60 U.S. (19 How.) 393,
15 L.Ed. 691 (1857) 22

Eastern R.R. Presidents Conf. v.
Noerr Motors Freight
365 U.S. 127, 81 S.Ct. 523,
5 L.Ed.2d 464 (1961) 9

Gendron v. Levi
423 U.S. 802, 96 S.Ct. 9,
46 L.Ed.2d 23 (1975) 5

General Motors Corp. v. City of New York
501 F.2d 639 (2nd Cir., 1974) 15

Gibbons v. Ogden
22 U.S. (9 Weat.) 1,
6 L.Ed. 23 (1824) 8

Goldberg v. Kelly
397 U.S. 254, 90 S.Ct. 1011,
25 L.Ed.2d 287 (1970) 12, 13, 16, 17

Hernandez v. Veterans' Administration
415 U.S. 391, 94 S.Ct. 1177,
39 L.Ed.2d 412 (1974) 9

Hines v. Lowery
305 U.S. 85, 59 S.Ct. 31,
83 L.Ed. 56 (1938) 17

Hoffmaster v. V.A.
444 F.2d 192 (3rd Cir., 1971) 17

Holly v. United States,
352 F. Supp. 175 (S.D. Oh. 1972),
afm'd w/o op. 477 F.2d 600
(6th Cir.), cert. den.
414 U.S. 1023 (1973) 21

Hughes Tool Co. v. Transworld Airlines,
409 U.S. 363, 93 S.Ct. 647,
34 L.Ed.2d 577 21

Ingraham v. Wright,
430 U.S 651, 97 S.Ct. 1401,
51 L.Ed.2d 711 (1977) 19

Johnson v. Robison
415 U.S. 361, 94 S.Ct. 1160,
39 L.Ed.2d 389 (1974) 9, 13, 14

Locke vs. New Orleans
4 Wall (71 U.S.) 172,
18 L.Ed. 482 (1866) 8

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Lynch v. United States,
292 U.S. 571, 54 S.Ct. 840,
78 L.Ed. 1434 (1934) 6

Margolin v. United States
269 U.S. 93, 46 S.Ct. 64,
70 L.Ed. 176 (1925) 17

Mathews v. Eldrige
424 U.S. 319, 96 S.Ct. 893,
47 L.Ed.2d 18 (1973) 17

NAACP v. Button,
371 U.S. 415, 83 S.Ct. 328,
9 L.Ed.2d 405 (1963) 12

N.L.R.B. v. Johnson
310 F.2d 550 (6th Cir., 1962) 16

Payton vs. New York
445 U.S. 573, 100 S.Ct. 1371,
63 L.Ed.2d 639 (1983) 5

Richardson v. Perales
402 U.S. 389, 91 S.Ct. 1420,
28 L.Ed.2d 842 (1971) 16

Rosen v. Walters
719 F.2d 1422 (9th Cir., 1983) 21

Schweiker v. McClure,
456 U.S. 188, 102 S.Ct. 1665,
72 L.Ed.2d 1 (1982) 19

Tyler v. Campbell,
106 U.S. 322, 1 S.Ct. 293,
27 L.Ed. 162 (18) 6

United States vs. Block
4 Sawy (U.S.) 211,
24 Fed.Cas. 14,609 (1877) 8

United States vs. Boyer
85 F. 425 (1898) 22

United States vs. Classic
313 U.S. 299, 61 S.Ct. 1031,
85 L.Ed. 1368 8

United States vs. Harris
1 Abb. (U.S.) 110,
26 Fed.Cas. 15,312 8

United States v. Kras,
409 U.S. 434, 93 S.Ct. 631,
34 L.Ed.2d 621 21

United States v. Mendoza
--- U.S. ---, 104 S.Ct. 568,
78 L.Ed.2d 379 (1984) 5

United States v. Pierce Freight Lines
327 U.S. 515, 66 S.Ct. 687,
90 L.Ed. 821 (1946) 16

United States v. Standard Oil Co.
136 F.Supp. 345 (S.D.N.Y., 1955) 15

Universal Camera Corp. v. N.L.R.B.
340 U.S. 474, 71 S.Ct. 456,
95 L.Ed. 456 (1950) 16

Veazie Bank vs. Fenno
8 Wall (75 U.S.) 533,
19 L.Ed. 482 (1869) 7

Wolff v. McDonald,
418 U.S. 539, 94 S.Ct. 2963,
41 L.Ed.2d 935 (1974) 18

Wright v. United States
302 U.S. 583, 58 S.Ct. 395,
82 L.Ed. 439 (1938) 7

UNITED STATES CONSTITUTION

Preamble 22

Article I, § 9 & § 10 22

1st Amendment 3, 4, 8, 10, 12, 21

5th Amendment 13, 14

6th Amendment 11

8th Amendment 18

9th Amendment 11

10th Amendment 11

UNITED STATES CODES

5 U.S.C. § 8591, et seq. 10

§ 1006(d) 16

18 U.S.C. §§ 201 - 218 15

22 U.S.C. § 801, et seq. 10

38 U.S.C. § 101(2) & (8) 1

§ 211(a) 2, 6

§ 211(b) 14

§ 3404(c) 2, 3, 5, 11-13, 17

42 U.S.C. § 401, et seq. 10

§ 1651, et seq. 10

§ 1751, et seq. 10

CODE OF FEDERAL REGULATIONS

20 CFR 404.975 and .976 (1979) 13

CODES OF PROFESSIONAL RESPONSIBILITY

American Bar Association, DR 5-101 15

DR 5-107 15

DR 7-102 17

DR 9-101(A) 15

DR 9-101(C) 15

California, Rule 2-110(1), (2) 18

HISTORICAL DOCUMENTS

Magna Carta (1215) 3, 9, 10, 21, 22, Appendix

MISCELLANEOUS

Davis, K.
Administrative Law Text, § 28.04. 21

Davis, K
Administrative Law Text 2nd. 21

Encylopedia Britannica,
Volumn 14 (1971) 22

Farrand, Max., The Records of the
Federal Convention, Vol 4 22

Hamilton, The Federalist Papers,
No. 84 22

Howard, A.E. Dick, MAGNA CARTA, Text
and Commentary Appendix

McKechnie, William Sharp.
Magna Carta. A Commentary on
the Great Charter of King John 22

Schwartz, Bernard.
The Bill of Rights: A Documentary
History. Volumn I, pp 21 22

United States Senate Document # 92-82
(1973) The Constitution of the
United States of America; Analysis
and Interpretation 10

United States Attorney General,
Opinions Of (Volumn 5) (1852) 8

U.S. Supreme Court Digest (L.Ed.)
Vol. 2 Appeal & Error § 910.8 21

West' California Annotated Codes,
Constitution, Volumn 3 22

Case No. 84-571

SUPREME COURT OF THE UNITED STATES

October Term 1984

HARRY N. WALTERS, Administrator of the Veterans Administration, et al., Appellants

vs.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al., Appellee,

and THE AMERICAN G.I. FORUM, etc., Intervenor-Appellee.

On Direct Appeal from

The United States District Court for The Northern District of California

Amicus Curiae Brief of ANDREW GROZA In Support of Appellee

INTEREST OF AMICUS CURIAE

Amicus curiae, Andrew Groza, is a veteran of World War II within the meaning of 38 U.S.C. § 101(2) & (8), by virtue of active military service from June 19, 1943 to July 8, 1944,

Appellant found that he had a disa-

bility based on a heart condition, but that it was not service connected.

Amicus Curiae brought a suit in the United States District Court for the Eastern District of California, Groza v. The Veterans' Administrator, et al., # Civ. S-82-679-MLS, alleging, inter alia, that the decision was arbitrary and capricious, not supported by the evidence, active concealment of military records and challenging the Constitutionality of 38 U.S.C. § 211(a) and § 3404(c). Defendants brought motions on the pleadings which were granted and the action dismissed with prejudice. Amicus curiae appealed. United States Court of Appeals, Ninth Circuit, No. 84-1783. That case was heard on oral argument on December 14, 1984, and is now pending.

The decision of this court may be determinative as to the constitutionality of 38 U.S.C. § 3404(c).

SUMMARY OF ARGUMENT

1. Stare decisis does not control constitutional issues; widespread practice cannot shield conduct from scrutiny; decisions in this court are sparse, and in one case without opinion; this court should re-examine the matter.

2. The constitution is construed as other legal instruments; each word and phrase must be given meaning; meaning is derived from the intent of framers; where two meanings are possible, the one which gives effect to the provision is preferred over one which would defeat the purpose of the provision.

3. Veterans have a First Amendment Right to petition for the redresss of grievances which can be traced back to rights found in the magna charta, and includes the right to defend their property interest in a pension.

4. Section 3404(c) is in violation

of a right constitutionally delegated to the Veteran; it impermissibly impairs 1st Amendment Rights; it violates equal protection of the laws; the government has an unfair advantage because it has a lawyer; the United States Attorney cannot represent two parties; the government can show no compelling justification for the restriction in light of the experience of other agencies.

Conclusion. Based upon the foregoing, this court should affirm National Radiation Survivors v. Walters, United States District Court for the Northern District of California, # C-83-1861-MHP, and remand for further proceedings.

ARGUMENT

I

STARE DECISIS IS NOT CONTROLLING

Neither the doctrine of collateral estoppel nor stare decisis, has been an absolute bar to litigating constitution-

al issues affecting broad, important social issues. Generally, United States v. Mendoza, --- U.S. ---, 104 S.Ct. 568, 574, 78 L.Ed.2d 379, 386-387 (1984). This Court has recognized that even longstanding widespread practice is not immune from scrutiny. E.g., Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1983) (Finding warrantless arrests in a home unconstitutional notwithstanding practice in 23 states).

Gendron v. Levi, 423 U.S. 802, 96 S.Ct. 9, 46 L.Ed.2d 23 (1975) is the last case on this issue in this Court and it was a per curiam decision without opinion affirming an appeal on a challenge to 38 U.S.C. § 3404(c). However, this court has cautioned that per curium decisions are often no more than decisions on the facts and ought not to be considered binding on lower courts in the absence of an opinion.

Tyler v. Campbell, 106 U.S. 322, 1 S.Ct. 293, 27 L.Ed. 162; Barton v. Geiler, 108 U.S. 161, 2 S.Ct. 387, 27 L.Ed. 687.

This Court has never held 38 U.S.C. § 211(a) constitutional.[1] In Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934) this court only found, in obitur dicta, that it was not relevant to the issues presented.

Therefore, the issue before the court is ripe for re-examination on the basis of the historical guarantees and protections afforded by the constitution, giving weight to the intent of the framers and the source of our liberties as defined and expounded in the Magna Charta of 1215.

II

STANDARDS OF CONSTITUTIONAL CONSTRUCTION

In the solution of constitutional questions the same rule of interpreta-

tion, and sources of judicial information, may be resorted to as in the construction of statutes and other instruments granting power. Adams v. Storey, 1 Paine (U.S.) 79, 1 Fed. Cas. page 141, 145 (1817). The constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern the construction of fundamental or other laws. Bank of the United States v. Deveaux, 5 Cranch (9 U.S.) 61, 85, 3 L.Ed. 38 (1809). No word or clause can be rejected as superfluous or unmeaning, but each must be given its due force and appropriate meaning. Wright v. United States, 302 U.S. 583, 588, 58 S.Ct. 395, 82 L.Ed. 439 (1938). Words and terms are to be taken in the sense they were used and understood at common law and at the time the constitution and the amendments were adopted. Veazie Bank v. Fenno, 8

Wall (75 U.S.) 533, 542, 19 L.Ed.482 (1869); Locke v. New Orleans, 4 Wall (71 U.S.) 172, 18 L.Ed. 334 (1866); Gibbons v. Ogden, 9 Weat. (22 U.S.) 1, 188-189, 6 L.Ed. 23 (1824); United States v. Harris, 1 Abb. (U.S.) 110, 26 Fed. Ca. No. 15, 312 (1866); United States v. Block, 4 Sawy. (U.S.) 211, 24 Fed.Cas. 14,609 (1877); Pardoning Power of the President, 5 Opinion U.S. Atty. Gen. 532, 535 (1852). Where there are several possible meanings of the words of the constitution, that meaning which will defeat rather than effectuate the constitutional purpose cannot rightly be preferred. United States v. Classic, 313 U.S. 299, 316, 61 S.Ct. 1031, 85 L.Ed. 1368.

III

VETERANS' HAVE A FIRST AMENDMENT RIGHT TO REDRESS GRIEVANCES

1st Amendment rights have always been recognized as embracing the right

of access to administrative agencies and demand for an exercise by the government of its powers in furtherance of the interest and prosperity of the petitioner. Eastern R.R. Presidents Conf. v. Noerr Motors Freight, 365 U.S. 127, 137, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); California Motor Trans. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); Brotherhood of R.T. v. Virginia, 377 U.S. 1, 5-7, 94 S.Ct. 1113, 12 L.Ed.2d 89, 11 A.L.R.3d 1196 (1964). Generally, Johnson v. Robison, 415 U.S. 361, 366fn.8, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974); Hernandez v. Veterans Administration, 45 U.S. 391, 94 S.Ct. 1177, 39 L.Ed.2d 412 (1974).

Veterans' Rights were expressly recognized in the Magna Charter of 1215,[2] to include benefit rights. Magna Charta, Article 2 (Benefits), appendix

p. 6; Art. 16 (Excessive Service), appendix p. 10; Art. 61 (Right of Review), appendix, p. 20. The Magna Charter is recognized as the antecedent of 1st Amendment Rights. U.S. Senate Document # 92-82 (1974) The Constitution of the United States of America; Analysis and Interpretation, page 1030ff.

The pension scheme enacted is not a mere gratuity, but the just compensation for the permanent taking of a veteran's ability to work which the 5th and 13th Amendment demands, and is constructively a form of worker's compensation. E.g., 5 U.S.C. § 8501, et seq; 22 U.S.C. § 801 et seq.; 42 U.S.C. § 401, et seq., § 1651, et seq and 1751, et seq.

Given the foregoing 1st Amendment and Magna Charta history, Veterans have a right to judicial review of decisions affecting their pensions.

IV

38 U.S.C. § 3404(c) IMPERMISSIBLY INHIBITS A VETERAN'S CHOICE OF COUNSEL

The United States Constitution provides in relvant part:

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

9th Amendment. And,

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

10th Amendment.

The Constitution does not delegate to the national government the right to determine who may or may not have counsel. Indeed, the right to retain counsel has been expressly reserved to the accused in criminal prosecutions. 6th Amendment. Reading the 9th and 10th Amendments in pari materia, the right to retain counsel of one's own choice remains

with the People,[3] unless the Government can show a compelling justification for the curtailment. Generally, NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).[4]

While this court has never required the appointment of counsel in administrative hearings, it has held that the right to retain counsel in an administrative hearing is an important and necessary right in protecting legitimate claims against the government. Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). Stated otherwise, any impediment to the acquisition of counsel would unduly restrict 1st Amendment Rights. In the context of the case at bench, § 3404(c) unduly restricts a Veteran's exercise of 1st Amendment Right to redress grievances predicated on denial of pension rights that he may have, and is therefore unconstitutional.

Alternatively and cummulatively, there is implied in the due process clause of the 5th Amendment a right to equal protection of the law (Johnson, supra, 415 U.S., at 364fn4).

In Goldberg v. Kelly, supra, 397 U.S. at 269-270, 90 S.Ct. 1011, 25 L.-Ed.2d 287 this Court rejected the notion that mere desire to protect the public purse was sufficient to override the individuals need for due process of law and the Assistance of Counsel in Social Security Cases. Social Security Cases have required the assistance of counsel with reasonable compensation ever since with no apparent ill effects. 20 CFR 404.975 and .976 (1979). That Veterans who have defended the very concept of due process should have less rights than those accorded welfare recepients whose benefits are unrelated to service in defense of their country smacks of a

denial of equal protection of the laws (Johnson, supra, 415 U.S., at 364fn4), or denial of due process of law for not being rationally related to furthering a legitimate governmental object, vis securing a just result free from arbitrary and capricious decision making. Johnson, supra, 415 U.S., at 374-375.

Moreover, the practice is offensive to procedural notions of a fair hearing guaranteed under the 5th Amendment. The Administrator has the right to Counsel, and may refer questions of law to his legal advisor. 38 U.S.C. § 211(b).

It is, therefore, unfair to restrict compensation in a manner which prevents a Veteran from retaining counsel of his own because it is most certain that on questions of law, the Administrator will give greater weight to the opinion of a trained lawyer before he listens to a Veteran untrained in

law and unaided by counsel, thus relegating him to the acceptance of whatever opinions adverse counsel has. Such a system is inherently unfair in violation of the 5th Amendment due process clause.

Moreover, the Attorney General cannot effectively, or ethically, represent both parties. All lawyers have a duty of loyalty. American Bar Association, Code of Professional Responsiblity [ABA, CPR] DR 5-101 to DR 5-107. E.g., General Motors Corp v. City of New York, 501 F.2d 639 (2nd Cir., 1974); United States v. Standard Oil Co., 136 F. Supp. 345 (S.-D.N.Y., 1955). ABA, CPR, DR 9-101(A); DR 9-101(C). See, 18 U.S.C. §§ 201-218 (federal anti-conflict of interest law).

The need for legal assistance cannot be overstated. Appellants do not make a factual showing that medical personnel are not used as a part of the decision making process as alleged by

Amicus Curiae in the Courts below.

A fundamental rule of administrative agency law is that an administrative agency must confine itself to the record before it and afford an opportunity to make a showing contrary to which judicial notice has been taken. 5 U.S.C. § 1006(d). N.L.R.B. v. Johnson, 310 F.2d 550 (6th Cir., 1962); United States v. Pierce Freight Lines, 327 U.S. 515, 66 S.Ct. 687, 90 L.Ed. 821; Universal Camera Corp., v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951); Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Without the assistance of counsel, it is clear that the Board, through one of its panel members, can take judicial notice of matters without affording the Veteran an opportunity to "cross-examine. Cf., Richardson v. Perales, 402 U.S. 389, 410, 91 S.Ct. 1420, 28 L.Ed.2d

842 (1971), with Mathews v. Eldrige, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1973). It is clear that an attorney can recommend, and select, where appropriate, the right expert to assist the veteran in making a record, and curtail the utilization of an expert not subject to cross-examination. Goldberg, supra, 397 U.S., at 269-270.

The chief grounds Appellants can muster in defense of § 3404(c) is that it discourages the promotion of invalid claims. Margolin v. United States, 269 U.S. 93, 46 S.Ct. 64, 70 L.Ed. 176 (1925); Hines v. Lowry, 305 U.S. 85, 59 S.Ct. 31, 83 L.Ed. 56 (1938); Hoffmaster v. V.A., 444 F.2d 192 (3rd Cir., 1971). There is no evidence that has been the experience is Social Security Cases. Moreover, attorney's have ABA and State Ethical Standards which prevent advocating frivolous claims. ABA, CPR, DR 7-

102(A)(1), (2); California Rules of Professional Responsibility, Rule 2-110(1), (2). There is no evidence that the persons chosen by Congress have ethical standards.[5] In view of potential for conflicts of interest inherent in having office furniture provided by Appellant, lack of legal training, and no compensation, the opposite is true. And it is conceivable meritorious claims will be lost for lack of competent counsel.

Appellant would also reduce Veterans who have defended the concept of due process of law to the status of convicted felons and school children. Appellant's Brief, pp. 26 - 28. However, this court has recognized that convicted felons have a substantially reduced liberty interest protected only by the 8th Amendment. Wolff v. McDonnell, 418 U.S. 539, 569-570, 94 S.Ct. 2963, 41 L.Ed.2d 435 (1974). Therefore, denial of counsel

to convicted felons is not a legal basis for denying counsel to Veterans.

Similarly, this Court recognized that at common law, school children had substantially less due process rights than others and was unwilling to change the common law. Ingraham v. Wright, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). At common law, Veterans had substantial due process rights regarding their pensions, supra Point III. Therefore, denial of counsel to school children is not a legal basis for denying counsel to Veterans.

A third type of case cited by Appellant, Schwiker v. McClure, 456 U.S. 188, is not about the right to counsel, but hearing officer qualifications. Hence, that case affords no legal justification for the denial of counsel.

CONCLUSION

In view of the foregoing arguments,

this court should find that the restriction on compensating counsel are unconstitutional because it constitutes either a denial of rights retained by the People, an unreasonable restraint or inhibition on 1st Amendment Petition Rights, a denial of due process of law, or a denial of equal protection of the laws, that the government has not sustained its burden of proving a compelling governmental justification, affirm the decision of the District Court and remand for further proceedings not inconsistent with this Court's decision.

Dated: February 6, 1985

Respectfully submitted,

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Footnotes:

1. Rosen v. Walters, 719 F.2d 1422 (9th

Cir., 1983) did not address the 1st Amendment rights to petition or trace its history first found in the Magna Carta. Holly v. United States, 352 F. Supp. 175 (S.D. Oh. 1972), affirmed without opinion 477 F.2d 600 (6th Cir.), cert. den. 414 U.S. 1023 (1973) was not a decision on the merits; the court merely refused to invoke a three judge panel as required at the time, holding at page 176 and citing a number of this Court's decisions that Congress could withhold judicial review. In fact not one single case cited by Holly supports that conclusion. Each of this Court's cited cases merely construed a Statute Congress had passed to: (1) determine whether or not congress had withheld judicial review; and, if not, (2) what that review was to be. In each case, this Court held that Congress had not foreclosed judicial review. It also cited K. Davis, Administrative Law Text, § 28.04 (see now, K. Davis Administrative Law Text 2nd). That treatise does not cite any 1st Amendment Right cases, or any case that Congress has the right to withhold judicial review, but does trace a history of this Court's retreat from a judicial philosophy of no judicial review. Finally, it is well settled that the denial of certiorari imports NO implicaton or inference concerning the court's views of the merits. United States v. Kras, 409 U.S. 434, 93 S.Ct. 631, 34 L.Ed.2d 621; Hughes Tool Co. v. Transworld Airlines, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577. Generally, 2 U.S. Supreme Court Digest (L.Ed.) Appeal & Error § 910.8.

2. A true copy is set out in the appendix. Reissue Charters vary in text, however the following resources have

preserved the original text: McKechnie, William Sharpe, Magna Carta; A Commentary on the Great Charter of King John. Schwartz, Bernard, The Bill of Rights: A Documentary History, Volumn 1, page 21; 14 Encyclopedia Britannica (1971), page 578; West's Annotated California Codes, Constitution, Volumn 3, page 759.

3. The Preamble does not create any subtantive rights, but it does define for whom the rights were created. United States vs. Boyer, 85 F. 425 (1898). It has always been recognized as reposing sovereignty in the People. Hamilton, The Federalist Papers, No. 84. Dred Scott vs. Sanford, 60 U.S. (19 How.) 404, 15 L.Ed. 691. See also, U.S. Constitution, Art. I, § 9 and § 10, abolishing nobility, and, inferentially, abolishing common law concepts of sovereignty. Farrand, Max, The Constitutional Debates, Volumn 4, pages 29 - 33.

4. This Court has held that protection from deprivation of federally protected rights is the same whether the conduct involves state or federal action. Generally, Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978).

5. It appears that Disabled American Veterans has breached a duty of loyalty to argue in its Brief that members ought not to have the right to retain counsel of their choice. There is no showing of an organizational vote. The short answer to the DAV is that retained counsel shifts advocacy costs from DAV, supported by appellant, to the Veteran only if the Veteran so chooses, and it gives the Veteran the opportunity to discover malpractice in the representation.

A.E. DICK HOWARD

AGNA CARTA

XT AND COMMENTARY



UNIVERSITY OF
SCHOOL OF LAW
McGEORGE

LISHED FOR THE MAGNA CARTA COMMISSION
THE UNIVERSITY PRESS OF VIRGINIA, CHARLOTTESVILLE

Magna Carta

Text and Commentary

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APPENDIX PG # 2

CONTENTS

1 COMMENTARY
3 King John and the Barons
8 The Provisions of Magna Carta
9 Feudal relationships
12 Courts and the administration of justice
16 Abuses of local officials
18 Correction of the King's past wrongs
18 Forest clauses
18 Towns and trade
19 Debts and estates
20 Church and state
20 Security for the keeping of the Charter
21 General clauses
22 Magna Carta's Influence
31 NOTE
33 THE TEXT OF MAGNA CARTA
53 BIBLIOGRAPHICAL NOTE

APPENDIX PG # 3

JOHN, by the grace of God, King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou: To the Archbishops, Bishops, Abbots, Earls, Barons, Justiciaries, Foresters, Sheriffs, Reeves, Ministers, and all Bailiffs and others, his faithful subjects, Greeting. Know ye that in the presence of God, and for the health of Our soul, and the souls of Our ancestors and heirs, to the honor of God, and the exaltation of Holy Church, and amendment of Our kingdom, by the advice of Our reverend Fathers, Stephen, Archbishop of Canterbury, Primate of all England, and Cardinal of the Holy Roman Church; Henry, Archbishop of Dublin; William of London, Peter of Winchester, Jocelin of Bath and Glastonbury, Hugh of Lincoln, Walter of Worces- *Preamble*

ter, William of Coventry, and Benedict of Rochester, Bishops; Master Pandulph, the Pope's subdeacon and familiar; Brother Aymeric, Master of the Knights of the Temple in England; and the noble persons, William Marshal, Earl of Pembroke; William, Earl of Salisbury; William, Earl of Warren; William, Earl of Arundel; Alan de Galloway, Constable of Scotland; Warin Fitz-Gerald, Peter Fitz-Herbert, Hubert de Burgh, Seneschal of Poitou, Hugh de Neville, Matthew Fitz-Herbert, Thomas Basset, Alan Basset, Philip Daubeny, Robert de Roppelay, John Marshal, John Fitz-Hugh, and others, Our liegemen:

The English Church shall be free; grant of liberties to free men of the kingdom

1 We have, in the first place, granted to God, and by this Our present Charter confirmed for Us and Our heirs forever–That the English Church shall be free and enjoy her rights in their integrity and her liberties untouched. And that We will this so to be observed appears from the fact that We of Our own free will, before the outbreak of the dissensions between Us and Our barons, granted, confirmed, and procured to be confirmed by Pope Innocent III the freedom of elections, which is considered most important and necessary to the English Church, which Charter We will both keep Ourself and will it to be kept with good faith by Our heirs forever. We have also granted to all the free men of Our kingdom, for Us and Our heirs forever, all the liberties underwritten, to have and to hold to them and their heirs of Us and Our heirs. [pp. 20, 21]

Reliefs for inheritance

2 If any of Our earls, barons, or others who hold of Us in chief by knight's service shall die, and at the time of his death his heir shall be of full age and owe a relief, he shall have his inheritance by ancient relief; to wit, the heir or heirs of an earl of an entire earl's barony, £100; the heir or heirs of a baron of an entire barony, £100; the heir or heirs of a knight of an entire knight's fee, 100*s.* at the most; and he that owes less shall give less, according to the ancient custom of fees. [p. 10]

Heir under age

3 If, however, any such heir shall be under age and in ward, he shall, when he comes of age, have his inheritance without relief or fine. [p. 10]

Rights of wards

4 The guardian of the land of any heir thus under age shall take therefrom only reasonable issues, customs, and services, without destruction or waste of men or property; and if We shall have committed the wardship of any such land to the sheriff or any other person answerable to Us for the issues thereof, and he commit destruction or waste, We will take an amends from him, and the land shall be committed to two lawful and discreet men of that fee, who shall be answerable for the issues to Us or to whomsoever We shall have assigned them. And if We shall give or sell the wardship of any such land to anyone, and he commit destruction or waste upon it, he shall lose the wardship, which shall be committed to two lawful and discreet men of that fee, who shall,

APPENDIX PG # 6

in like manner, be answerable unto Us as has been aforesaid. [p. 10]

Duties of guardians

5 The guardian, so long as he shall have the custody of the land, shall keep up and maintain the houses, parks, fishponds, pools, mills, and other things pertaining thereto, out of the issues of the same, and shall restore the whole to the heir when he comes of age, stocked with ploughs and tillage, according as the season may require and the issues of the land can reasonably bear. [p. 10]

Marriage of heirs

6 Heirs shall be married without loss of station, and the marriage shall be made known to the heir's nearest of kin before it be contracted. [p. 11]

Rights of widows

7 A widow, after the death of her husband, shall immediately and without difficulty have her marriage portion and inheritance. She shall not give anything for her marriage portion, dower, or inheritance which she and her husband held on the day of his death, and she may remain in her husband's house for forty days after his death, within which time her dower shall be assigned to her. [p. 11]

emarriage of widows

8 No widow shall be compelled to marry so long as she has a mind to live without a husband, provided, however, that she give security that she will not marry without Our assent, if she holds of Us, or that of the lord of whom she holds, if she holds of another. [p. 11]

APPENDIX PG # 7

Debtors and sureties

9 Neither We nor Our bailiffs shall seize any land or rent for any debt so long as the debtor's chattels are sufficient to discharge the same; nor shall the debtor's sureties be distrained so long as the debtor is able to pay the debt. If the debtor fails to pay, not having the means to pay, then the sureties shall answer the debt, and, if they desire, they shall hold the debtor's lands and rents until they have received satisfaction of the debt which they have paid for him, unless the debtor can show that he has discharged his obligation to them. [p. 19]

Interest on debts

*10 If anyone who has borrowed from the Jews any sum of money, great or small, dies before the debt has been paid, the heir shall pay no interest on the debt so long as he remains under age, of whomsoever he may hold. If the debt shall fall into Our hands, We will take only the principal sum named in the bond. [p. 20]

Rights of widows and heirs as against creditors

*11 And if any man dies indebted to the Jews, his wife shall have her dower and pay nothing of that debt; if the deceased leaves children under age, they shall have necessaries provided for them in keeping with the estate of the deceased, and the debt shall be paid out of the residue, saving the service due to the deceased's feudal lords. So shall it be done with regard to debts owed persons other than Jews. [p. 20]

No aids save by common counsel

*12 No scutage or aid shall be imposed in Our kingdom unless by common counsel thereof, except to ransom Our person, make Our eldest son a knight, and once to marry Our eldest daughter, and for these only a reasonable aid shall be levied. So shall it be with regard to aids from the City of London. [p. 11]

Liberties of London and other towns

13 The City of London shall have all her ancient liberties and free customs, both by land and water. Moreover, We will and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs. [p. 19]

Calling of council to consent to aids

*14 For obtaining the common counsel of the kingdom concerning the assessment of aids (other than in the three cases aforesaid) or of scutage, We will cause to be summoned, severally by Our letters, the archbishops, bishops, abbots, earls, and great barons; We will also cause to be summoned, generally, by Our sheriffs and bailiffs, all those who hold lands directly of Us, to meet on a fixed day, but with at least forty days' notice, and at a fixed place. In all letters of such summons We will explain the cause thereof. The summons being thus made, the business shall proceed on the day appointed, according to the advice of those who shall be present, even though not all the persons summoned have come. [p. 11]

Limit on other lords' aids

*15 We will not in the future grant permission to any man to levy an aid upon his free men, except to ransom his person, make his eldest son a knight, and once to marry his eldest daughter, and on each of [illegible] occasions only a reasonable aid shall be le[illegible] [p. 11]

Knight's fee

16 No man shall be compell[illegible] perform more service for a knight's fe[illegible] other free tenement than is due therefrom[illegible] 11]

Justice to be had at a fixed place

17 Common Pleas shall not [illegible]ollow Our Court, but shall be held in some [illegible]rtain place. [p. 12]

Land disputes to be tried in their counties

18 Recognizances of novel disseisin, mort d'ancestor, and darrein presentment shall be taken only in their proper counties, and in this manner: We or, if We be absent from the realm, Our Chief Justiciary shall send two justiciaries through each county four times a year, and they, together with four knights elected out of each county by the people thereof, shall hold the said assizes in the county court, on the day and in the place where that court meets. [p. 12]

Conclusion of assizes

19 If the said assizes cannot be held on the day appointed, so many of the knights and freeholders as shall have been present on that day shall remain as will be sufficient for the administration of justice, according as the business to be done be greater or less. [p. 13]

APPENDIX PG 10

Fines to be measured by the offense; livelihoods not to be destroyed

20 A free man shall be amerced for a small fault only according to the measure thereof, and for a great crime according to its magnitude, saving his position; and in like manner a merchant saving his trade, and a villein saving his tillage, if they should fall under Our mercy. None of these amercements shall be imposed except by the oath of honest men of the neighborhood. [p. 13]

Same for barons

21 Earls and barons shall be amerced only by their peers, and only in proportion to the measure of the offense. [p. 13]

Same for clergymen

22 No amercement shall be imposed upon a clerk's lay property, except after the manner of the other persons aforesaid, and without regard to the value of his ecclesiastical benefice. [p. 13]

Obligations to build bridges

23 No village or person shall be compelled to build bridges over rivers except those bound by ancient custom and law to do so. [p. 16]

Unauthorized persons not to hold trials

24 No sheriff, constable, coroners, or other of Our bailiffs shall hold pleas of Our Crown. [p. 15]

Ceiling on rents

*25 All counties, hundreds, wapentakes, and tithings (except Our demesne manors) shall remain at the ancient rents, without any increase. [p. 17]

APPENDIX PG 11

Debts owed the Crown

26 If anyone holding a lay fee of Us shall die, and the sheriff or Our bailiff show Our letters patent of summons touching the debt due to Us from the deceased, it shall be lawful for such sheriff or bailiff to attach and catalogue the chattels of the deceased found in the lay fee to the value of that debt, as assessed by lawful men. Nothing shall be removed therefrom until Our whole debt be paid; then the residue shall be given up to the executors to carry out the will of the deceased. If there be no debt due from him to Us, all his chattels shall remain the property of the deceased, saving to his wife and children their reasonable shares. [p. 20]

Intestacy

*27 If any free man shall die intestate, his chattels shall be distributed by his nearest kinfolk and friends, under supervision of the Church, saving to each creditor the debts owed him by the deceased. [p. 20]

Compensation for taking of private property

28 No constable or other of Our bailiffs shall take corn or other chattels of any man without immediate payment, unless the seller voluntarily consents to postponement of payment. [p. 17]

Castle-guard

29 No constable shall compel any knight to give money in lieu of castle-guard when the knight is willing to perform it in person or (if reasonable cause prevents him from performing it himself) by some other fit man. Further, if We lead or send him into military service,

APPENDIX PG 12

he shall be quit of castle-guard for the time he shall remain in service by Our command. [p. 17]

No taking of horses without consent

30 No sheriff or other of Our bailiffs, or any other man, shall take the horses or carts of any free man for carriage without the owner's consent. [p. 17]

No taking of wood without consent

31 Neither We nor Our bailiffs will take another man's wood for Our castles or for any other purpose without the owner's consent. [p. 17]

Lands of felons

32 We will retain the lands of persons convicted of felony for only a year and a day, after which they shall be restored to the lords of the fees. [p. 12]

Removal of fishweirs

33 All fishweirs shall be entirely removed from the Thames and Medway, and throughout England, except upon the seacoast. [p. 19]

Writ of praecipe

34 The writ called "praecipe" shall not in the future issue to anyone respecting any tenement if thereby a free man may not be tried in his lord's court. [p. 16]

Uniform weights and measures

35 There shall be one measure of wine throughout Our kingdom, and one of ale, and one measure of corn, to wit, the London quarter, and one breadth of dyed cloth, russets, and haberjets, to wit, two ells within the selvages. As with measures so shall it also be with weights. [p. 19]

APPENDIX PG 13

36 Henceforth nothing shall be given or taken for a writ of inquisition upon life or limbs, but it shall be granted gratis and not be denied. [p. 16]

Writs upon life or limbs

37 If anyone holds of Us by fee farm, socage, or burgage, and also holds land of another by knight's service, We will not by reason of that fee farm, socage, or burgage have the wardship of his heir, or the land which belongs to another man's fee; nor will We have the wardship of such fee farm, socage, or burgage unless such fee farm owe knight's service. We will not have the wardship of any man's heir, or the land which he holds of another by knight's service, by reason of any petty serjeanty which he holds of Us by service of rendering Us daggers, arrows, or the like. [p. 11]

Crown wardship

38 In the future no bailiff shall upon his own unsupported accusation put any man to trial without producing credible witnesses to the truth of the accusation. [p. 16]

No man to be put to his trial upon unsupported accusation

39 No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land. [p. 14]

Free men guaranteed "law of the land"

40 To no one will We sell, to none will We deny or delay, right or justice. [p. 15]

Guarantee of equal justice

APPENDIX PG 14

Free movement for merchants

41 All merchants shall have safe conduct to go and come out of and into England, and to stay in and travel through England by land and water for purposes of buying and selling, free of illegal tolls, in accordance with ancient and just customs, except, in time of war, such merchants as are of a country at war with Us. If any such be found in Our dominion at the outbreak of war, they shall be attached, without injury to their persons or goods, until it be known to Us or Our Chief Justiciary how Our merchants are being treated in the country at war with Us, and if Our merchants be safe there, then theirs shall be safe with Us. [p. 19]

Freedom to leave and reenter the kingdom

*42 In the future it shall be lawful (except for a short period in time of war, for the common benefit of the realm) for anyone to leave and return to Our kingdom safely and securely by land and water, saving his fealty to Us. Excepted are those who have been imprisoned or outlawed according to the law of the land, people of the country at war with Us, and merchants, who shall be dealt with as aforesaid. [p. 19]

Escheats

43 If anyone die holding of any escheat, such as the honor of Wallingford, Nottingham, Boulogne, Lancaster, or other escheats which are in Our hands and are baronies, his heir shall not give any relief or do any service to Us other than he would owe to the baron, if such barony had been in the hands of a baron, and We will hold the escheat in the same manner in which the baron held it. [p. 12]

APPENDIX PG 15

Forest laws

44 Persons dwelling outside the forest need not in the future come before Our justiciaries of the forest in answer to a general summons unless they be impleaded or are sureties for any person or persons attached for breach of forest laws. [p. 18]

Appointment only of those who know the law

*45 We will appoint as justiciaries, constables, sheriffs, or bailiffs only such men as know the law of the land and will keep it well. [p. 16]

Wardship of abbeys

46 All barons who have founded abbeys, evidenced by charters of English kings or ancient tenure, shall, as is their due, have the wardship of the same when vacant. [p. 12]

Forest boundaries

47 All forests which have been created in Our time shall forthwith be disafforested. So shall it be done with regard to rivers which have been placed in fence in Our time. [p. 18]

Evil forest customs

*48 All evil customs concerning forests and warrens, foresters and warreners, sheriffs and their officers, or riverbanks and their conservators shall be immediately inquired into in each county by twelve sworn knights of such county, chosen by honest men of that county, and shall within forty days after the inquest be completely and irrevocably abolished, provided always that the matter shall have been previously brought to Our knowledge, or that of Our Chief Justiciary if We Ourself shall not be in England. [p. 18]

APPENDIX PG 16

Return of hostages

*49 We will immediately return all hostages and charters delivered to Us by Englishmen as security for the peace or for the performance of loyal service. [p. 18]

Ouster of Poitevin favorites

*50 We will entirely remove from their bailiwicks the kinsmen of Gerard de Athyes, so that henceforth they shall hold no bailiwick in England: Engelard de Cigogné, Peter, Guy, and Andrew de Chanceaux, Guy de Cigogné, Geoffrey de Martigny and his brothers, Philip Mark and his brothers, and Geoffrey his nephew, and all their followers. [p. 18]

Banishment of mercenaries

*51 As soon as peace is restored, We will banish from Our kingdom all foreign knights, bowmen, attendants, and mercenaries, who have come with horses and arms, to the kingdom's hurt. [p. 18]

Restoration of lands and rights

*52 If anyone has been disseised or deprived by Us, without the legal judgment of his peers, of lands, castles, liberties, or rights, We will immediately restore the same, and if any dispute shall arise thereupon, the matter shall be decided by judgment of the twenty-five barons mentioned below in the clause for securing the peace. With regard to all those things, however, of which any man was disseised or deprived, without the legal judgment of his peers, by King Henry Our Father or Our Brother King Richard, and which remain in Our hands or are held by others under Our warranty, We shall have respite during the term commonly allowed

APPENDIX PG 17

to the Crusaders, except as to those matters on which a plea had arisen, or an inquisition had been taken by Our command, prior to Our taking the Cross. Immedately after Our return from Our pilgrimage, or if by chance We should remain behind from it, We will at once do full justice. [p. 18]

Respite during Crusade

*53 Likewise, We shall have the same respite in rendering justice with respect to the disafforestation or retention of those forests which Henry Our Father or Richard Our Brother afforested, and to wardships of lands belonging to another's fee, which We hitherto have held by reason of the fee which some person has held of Us by knight's service, and to abbeys founded in another's fee than Our own, whereto the lord of that fee asserts his right. When We return from Our pilgrimage, or if We remain behind from it, We will forthwith do full justice to the complainants in these matters. [p. 18]

Women's appeals

54 No one shall be arrested or imprisoned upon a woman's appeal for the death of any person other than her husband. [p. 16]

Remission of unlawful fines

*55 All fines unjustly and unlawfully given to Us, and all amercements levied unjustly and against the law of the land, shall be entirely remitted or the matter settled by judgment of the twenty-five barons of whom mention is made below in the clause for securing the peace, or the majority of them, together with the

aforesaid Stephen, Archbishop of Canterbury, if he himself can be present, and any others whom he may wish to bring with him for the purpose; if he cannot be present, the business shall nevertheless proceed without him. If any one or more of the said twenty-five barons be interested in a suit of this kind, he or they shall be set aside, as to this particular judgment, and another or others, elected and sworn by the rest of the said baron[illegible] this occasion only, be substituted in [illegible]r their stead. [p. 18]

Restoration of Welsh rights

56 If We have disseised or deprived the Welsh of lands, liberties, or other things, without legal judgment of their peers, in England or Wales, they shall immediately be restored to them, and if a dispute shall arise thereon, the question shall be determined in the Marches by judgment of their peers according to the law of England as to English tenements, the law of Wales as to Welsh tenements, and the law of the Marches as to tenements in the Marches. The same shall the Welsh do to Us and Ours. [p. 18]

Respite during Crusade

*57 But with regard to all those things of which any Welshman was disseised or deprived, without legal judgment of his peers, by King Henry Our Father or Our Brother King Richard, and which We hold in Our hands or others hold under Our warranty, We shall have respite during the term commonly allowed to the Crusaders, except as to those matters whereon a suit had arisen or an inquisition had been

taken by Our command prior to Our taking the Cross. Immediately after Our return from Our pilgrimage, or if by chance We should remain behind from it, We will do full justice according to the laws of the Welsh and the aforesaid regions. [p. 18]

*58 We will immediately return the son of Llywelyn, all the Welsh hostages, and the charters which were delivered to Us as security for the peace. [p. 18]

Return of Welsh hostages

*59 With regard to the return of the sisters and hostages of Alexander, King of the Scots, and of his liberties and rights, We will do the same as We would with regard to Our other barons of England, unless it should appear by the charters which We hold of William his father, late King of the Scots, that it ought to be otherwise; this shall be determined by judgment of his peers in Our court. [p. 18]

Rights of Alexander, King of Scots

60 All the customs and liberties aforesaid, which We have granted to be enjoyed, as far as in Us lies, by Our people throughout Our kingdom, let all Our subjects, whether clerks or laymen, observe, as far as in them lies, toward their dependents. [p. 22]

Liberties to be granted to lesser tenants

*61 Whereas We, for the honor of God and the amendment of Our realm, and in order the better to allay the discord arisen between Us and Our barons, have granted all these things aforesaid, We, willing that they be forever enjoyed wholly and in lasting strength, do give

Committee of twenty-five barons to enforce Charter

APPENDIX PG ■ 20

and grant to Our subjects the following security, to wit, that the barons shall elect any twenty-five barons of the kingdom at will, who shall, with their utmost power, keep, hold, and cause to be kept the peace and liberties which We have granted unto them and by this Our present Charter have confirmed, so that if We, Our Justiciary, bailiffs, or any of Our ministers offend in any respect against any man, or shall transgress any of these articles of peace or security, and the offense be brought before four of the said twenty-five barons, those four barons shall come before Us, or Our Chief Justiciary if We are out of the kingdom, declaring the offense, and shall demand speedy amends for the same. If We or, in case of Our being out of the kingdom, Our Chief Justiciary fail to afford redress within the space of forty days from the time the case was brought before Us or, in the event of Our having been out of the kingdom, Our Chief Justiciary, the aforesaid four barons shall refer the matter to the rest of the twenty-five barons, who, together with the commonalty of the whole country, shall distrain and distress Us to the utmost of their power, to wit, by capture of Our castles, lands, and possessions and by all other possible means, until compensation be made according to their decision, saving Our person and that of Our Queen and children; as soon as redress has been had, they shall return to their former allegiance. Anyone in the kingdom may take oath that, for the accomplishment of all the afore-

APPENDIX PG ■ 21

said matters, he will obey the orders of the said twenty-five barons and distress Us to the utmost of his power; and We give public and free leave to everyone wishing to take such oath to do so, and to none will we deny the same. Moreover, all such of Our subjects who shall not of their own free will and accord agree to swear to the said twenty-five barons, to distrain and distress Us together with them, We will compel to do so by Our command in the manner aforesaid. If any one of the twenty-five barons shall die or leave the country or be in any way hindered from executing the said office, the rest of the said twenty-five barons shall choose another in his stead, at their discretion, who shall be sworn in like manner as the others. In all cases which are referred to the said twenty-five barons to execute, and in which a difference shall arise among them, supposing them all to be present, or in which not all who have been summoned are willing or able to appear, the verdict of the majority shall be considered as firm and binding as if the whole number should have been of one mind. The aforesaid twenty-five shall swear to keep faithfully all the aforesaid articles and, to the best of their power, to cause them to be kept by others. We will not procure, either by Ourself or any other, anything from any man whereby any of these concessions or liberties may be revoked or abated. If any such procurement be made, let it be null and void; it shall never be made use of either by Us or by any other. [p. 20]

APPENDIX PG 22

Pardon of ill-will and trespasses

*62 We have also wholly remitted and pardoned all ill-will, wrath, and malice which has arisen between Us and Our subjects, both clergy and laymen, during the disputes, to and with all men. Moreover, We have fully remitted and, as far as in Us lies, wholly pardoned to and with all, clergy and laymen, all trespasses made in consequence of the said disputes from Easter in the sixteenth year of Our reign till the restoration of peace. Over and above this, We have caused to be made in their behalf letters patent by testimony of Stephen, Archbishop of Canterbury, Henry, Archbishop of Dublin, the Bishops above-mentioned, and Master Pandulph, for the security and concessions aforesaid. [p. 18]

Oath to observe rights of Church and people

*63 Wherefore We will, and firmly charge, that the English Church shall be free, and that all men in Our kingdom shall have and hold all the aforesaid liberties, rights, and concessions, well and peaceably, freely, quietly, fully, and wholly, to them and their heirs, of Us and Our heirs, in all things and places forever, as is aforesaid. It is moveover sworn, as well on Our part as on the part of the barons, that all these matters aforesaid shall be kept in good faith and without deceit. Witness the abovenamed and many others. Given by Our hand in the meadow which is called Runnymede, between Windsor and Staines, on the fifteenth day of June in the seventeenth year of Our reign. [pp. 20, 21]

APPENDIX PG 23

No. 84-571

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IN THE

Supreme Court of the United States

October Term, 1984

HARRY N. WALTERS, Administrator of Veterans' Affairs, *et al.*

Appellants

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, *et al.*

Appellees

On Appeal from the United States District Court for the Northern District of California

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BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae (in support of Appellees)

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TABLE OF CONTENTS

Table of Authorities ii

Interest of Amicus Curiae 1

The challenged statutory provisions and their origin 4

Statement of the case 6

Summary of argument 7

Argument 8

I. The present $10 attorney fee limit, even if it had a justifiable purpose when first adopted during the Civil War, is unjustifiable now 8

II. The constitutional right to procedural due process includes the right not to be denied the assistance of counsel in proceedings before government agencies deciding an individual's claim for statutory benefits 13

III. The First Amendment rights of freedom of speech and association, and to petition the government for redress of grievances, are impaired when persons for whom statutory benefits are intended are prevented by law or governmental action from choosing and using qualified legal counsel to assist them in seeking those benefits 15

IV. The *Gendron* affirmance does not preclude affirmance of the District Court's decision in this case 16

V. The *Reese* case in the VA illustrates how a competent attorney can provide much better assistance, in a complex VA case, than is furnished by lay representatives of veterans organizations, and can make the difference between a claimant's obtaining, or being denied, the statutory benefits intended by Congress 17

Conclusion 20

TABLE OF AUTHORITIES

CASES **PAGE**

Andrews v. *California,* 386 U.S. 738 (1967) 15

Barnett v. *Lindsay,* 319 F. Supp. 610 (D. Utah, 1970) 13

Bates v. *State Bar of Arizona,* 433 U.S. 350 (1977) 16

Bounds v. *Smith,* 430 U.S. 817 (1977) 16

Brotherhood of Railroad Trainmen v. *Virginia State Bar,* 377 U.S. 1 (1964)..... 15

Calder v. Durham Housing Authority, 433 F. 2d 998 (4th Cir. 1970), *cert. den.* 401 U.S. 1003 (1971) 13

Davis v. *United States,* 415 F. Supp. 1086 (D. Kans. 1976) 13

Devine v. *Celland,* 616 F. 2d 1080 (9th Cir. 1980) 12, 13

Elliot v. *Weinberger,* 564 F. 2d 1219, (9th Cir. 1977), modified on other grounds *sub. nom. Califano* v. *Yamasaki,* 442 U.S. 682 (1979) 13

Entsminger v. *Iowa,* 386 U.S. 748 (1967)..... 15

Evitts v. *Lucey,* ____ U.S. ____, 53 U.S. Law Week 4101 (Jan. 21, 1985) 15

Gendron v. *Saxbe,* 389 F. Supp. 1303 (C.D., Calif. 1975), aff'd per curiam *sub. nom. Gendron* v. *Levi,* 423 U.S. 802 (1975) 16

Goldberg v. *Kelly,* 397 U.S. 254 (1970)..... 13

Griffeth v. *Detrich,* 603 F. 2d 118 (9th Cir. 1978), *cert. den. sub. nom. Peer* v. *Griffeth,* 445 U.S. 970 (1980) 13

Kelly v. *Railroad Retirement Board,* 625 F. 2d 486 (3rd Cir. 1980) 13

NAACP v. *Button,* 371 U.S. 415 (1963) 15

Page

National Association of Radiation Survivors v. *Walters,* 589 F. Supp. 1302 (N.D., Calif. 1984) 7

Plato v. *Roudebush,* 397 F. Supp. 1295 (D. Md. 1975)..... 13

Powell v. *Alabama,* 287 U.S. 45 (1932) 14

Reese, Case of Joseph W., XC 28 733 518, in Veterans Administration 17, 18

Ressler v. *Pierce,* 692 F. 2d 1212 (9th Cir. 1982)..... 13

Shaw v. *Weinberger,* 395 F. Supp. 268 (W.D. N.C. 1975) 13

Smith v. *United States,* 83 F. 2d 631 (8th Cir. 1936) 8

Tatum v. *Matthews,* 541 F. 2d 161 (6th Cir. 1976) 13

United Mineworkers v. *Illinois Bar Association,* 389 U.S. 217 (1967) 15

United Transportation Union v. *State Bar of Michigan, 401 U.S. 576 (1971)* 16

Wright v. *Califano,* 587 F. 2d 345 (7th Cir. 1978) 13

CONSTITUTION

First Amendment 4, 7, 15, 16, 17

Fifth Amendment (Due Process clause) 4, 7, 15, 16, 17

STATUTES AND U.S. CODE

Act of July 14, 1862, 12 Stat. 566, 568 5

Act of July 4, 1864, 13 Stat. 387, 389 5

Act of June 12, 1917, 40 Stat. 102, 105 6

Act of Oct. 6, 1917, 40 Stat. 398, 410 6

Act of May 20, 1918, 40 Stat. 555 6

Act of June 7, 1924, 43 Stat. 607, 612 6

Act of March 4, 1925, 43 Stat. 1302, 1311 6

Page

Act of June 29, 1936, 49 Stat. 2031, 2032 6
Act of June 17, 1957, 71 Stat. 83, 140-141 6
Act of Sept. 2, 1958, 72 Stat. 1105, 1239 6
38 U.S.C., Chapt. 13 17
38 U.S.C. 211(a) 2
38 U.S.C. 312(a)(1) 18
38 U.S.C. 784(g) 6
38 U.S.C. 3402(a) 1
38 U.S.C. 3404(c) 2, 4, 6, 20
38 U.S.C. 3405 ..... 2, 4, 5, 6, 20

MISCELLANEOUS

H.R. 585, 99th Cong. (Jan. 22, 1985) 3
S. 367, 99th Cong. (Jan. 31, 1985) 3
Economic Report of the President, H. Doc. 99-19, transmitted to Congress Feb., 1985, page 276 9
Lambeth, Harry J., "Practicing Law in 1878," 64 Amer. Bar Association Journal, 1014, 1021-1022 (July, 1978) 9
Statistical Abstract of the United States, 1984, page 357 9
U.S. Department of Commerce, "Historical Statistics of the United States," Part 1, pages 165, 170 and 176 (1975) 9

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Appellees

On Appeal from the United States District Court for the Northern District of California

---

BRIEF OF AMERICAN VETERANS COMMITTEE, INC. (AVC) Amicus Curiae (in support of Appellees)*

INTEREST OF AMICUS CURIAE

The American Veterans Committee, Inc. (AVC) is a national veterans organization, founded in 1943. Its members served honorably in the Armed Forces of the United States in World War I, World War II, Korean War, and/or Vietnam War.

As a veterans organization recognized by the Veterans Administration (VA) pursuant to 38 U.S. Code 3402(a)(1), AVC has for many years aided veterans and their kin in

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*Pursuant to this Court's Rule 36, letters from counsel for all parties consenting to filing this Brief have been filed with the Clerk of this Court.

applying for benefits under federal programs administered by VA. AVC believes such aid helps to advance the purposes of these programs. However, AVC has also long believed:

(a) that 38 U.S. Code 3404(c) and 3405, which prohibit attorneys from receiving more than $10 for providing legal services to those seeking VA-administered benefits, result in denying to those applicants the opportunity to have effective legal assistance to obtain those benefits;

(b) that such denial, particularly in the context of VA's exclusive control over all applications for such statutory benefits and the unavailability of judicial review as to virtually all VA actions,[1] deprives claimants for veterans' benefits of their constitutional rights, and results in an administrative system for the adjudication of veterans benefits that is unfair to many applicants; and

(c) that this denial of the constitutional right to have legal counsel is not answered by VA's statement that claimants for veterans benefits do not need the services of a lawyer because claimants will be fully helped by VA staff and by representatives of veterans organizations. The facts are (1) that neither VA nor any governmental agency can, realistically, fully act for both the government's interest and a claimant's interest on disputed issues while also acting as judge of the merits of claims free from any judicial review, and (2) that although lay representatives of veterans' organizations do adequately help many claimants in relatively simple matters, they cannot, and do not, provide the type of legal assistance

[1]38 U.S. Code 211(a)

needed in many cases, particularly where factual or legal issues are complex.

We also believe that a person's right to have assistance of legal counsel in relation to his or her legal claim is so firmly a part of our Constitution that it should not be denied to a veteran or his or her survivors for statutorily-granted benefits. The $10-fee limit is so nugatory, so restrictive, so debarring, that it effectively destroys any realistic opportunity[2] for claimants of veterans benefits to obtain legal counsel in cases whose complexity is often beyond their capability to handle in a VA proceeding, even with such aid as they might get from VA staff and lay representatives of veterans organizations. It is particularly important to note that the VA

[2]We do not say that every statutory limit on attorneys' fees amounts to a denial of due process and the constitutional right to legal counsel. For example, on January 22, 1985, Cong. Don Edwards and 86 other Members of Congress introduced H.R. 585, and on January 31, 1985, Sen. Gary Hart and 25 other Senators introduced S. 367, which would modify, but not eliminate, the present limits on attorneys' fees relating to claims for veterans benefits. These bills, in slightly different form, would continue the $10 fee limit until VA renders an initial decision, but would authorize attorney fees in further VA proceedings, equal to the lesser of (a) any fee agreed upon by the claimant and the attorney, or (b) 25 percent of past due benefits obtained under a contingent fee contract, or (c) $500. But the bills would authorize the VA Administrator to allow an even greater fee in cases involving extraordinary circumstances, or pursuant to subsequent VA regulations based on changed economic conditions. In addition, the bills would authorize judicial review of most VA decisions, and in such judicial proceedings the court could award "reasonable fees" in cases resolved in the claimant's favor, up to 25 percent of past due benefits obtained under a contingent fee contract, or up to $750 in other cases. When the bills are debated, it may be argued that these limits ought to be raised. But it is obvious that those limits provide a far more reasonable opportunity for obtaining legal services prior to final determination of the claim for veterans' benefits than the present $10-fee limit which effectively destroys any such opportunity.

proceeding is the all-important stage for determining claims for veterans' benefits, since most VA rulings on claims are not, under present law, subject to any judicial review.

We believe that any purpose of the present attorney-fee restriction, even if justifiable when the restriction was first enacted in 1862 (over 122 years ago), does not now justify the deprivation of independent legal assistance which results from that fee restriction, and that such deprivation at this time denies to applicants for statutory veterans benefits their right to due process of law and their right to have legal counsel of their choice under the Fifth and First Amendments to the Constitution.

THE CHALLENGED STATUTORY PROVISIONS AND THEIR ORIGIN

The current statutory provisions challenged in this case are:

38 U.S.C. 3404(c)

"The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed."

38 U.S.C. 3405

"Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both."

The first predecessor of these provisions limiting the fees of attorneys and agents who aided a claimant for benefits related to military service was the Act of July 14, 1862 (12 Stat. 566, 568). Sec. 6 allowed a maximum of $5 to attorneys and agents for "making out and causing to be duly executed a declaration by the applicant, with the necessary affidavits, and forwarding the same to the Pension Office, with the requisite correspondence," plus $1.50 in "cases wherein additional testimony is required by the Commissioner of Pensions, for each affidavit so required and executed and forwarded (except the affidavits of surgeons)." Sec. 7 of the 1862 Act, using virtually the same language now in 38 U.S. Code 3405, imposed criminal penalties upon attorneys and agents who sought more than these limited fees. Sec. 12 of the Act of July 4, 1864 (13 Stat. 387, 389) changed these limits to a maximum of $10; and sec. 13 of the 1864 Act broadened the criminal penalties language.

In the next 90 years, Congress enacted some two dozen statutes authorizing military-service related benefits for various classes of beneficiaries. Most of these statutes imposed flat limits (from zero to $25) on fees of attorneys and agents who helped prepare claim forms and correspondence for applicants seeking those benefits. Five statutes, relating to litigation authorized in relation to military-service insurance benefits, beginning in 1917, permitted attorneys fees of up to 10 percent of the amount recovered

in such litigation.[3] These laws were later consolidated and codified.[4] The current $10 fee limit, and penalties, in 38 U.S. Code 3404(c) and 3405, now apply to all types of legal work relating to all claims under VA-administered programs except insofar as 38 U.S. Code 784(g) allows a fee up to 10 percent of the amount recovered in litigated insurance cases.

STATEMENT OF THE CASE

This suit, challenging the constitutionality of the $10 fee limitation, was instituted by several individual veterans, a veteran's widow, and two veterans organizations, many of whose members have pending claims for, or were denied, service-connected death-and-disability benefits authorized under statutes administered by V.A.

The plaintiffs engaged in extensive discovery proceedings (including depositions, interrogatories, affidavits, exhibits, etc.) to establish the scope of, and the methods for handling, claims for veterans benefits, the need for independent legal assistance, etc.

U.S. District Judge Patel ruled that the $10 fee limit is now unconstitutional and enjoined its enforcement. *National*

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[3]

Act of	Citation	Maximum Fee
June 12, 1917	40 Stat. 102, 105	10 percent
Oct. 6, 1917	40 Stat. 398, 410	10 percent
May 20, 1918	40 Stat. 555	5 percent plus $3 for preparing forms
June 7, 1924	43 Stat. 607, 612	5 percent
March 4, 1925	43 Stat. 1302, 1311	10 percent

[4] Act of June 29, 1936, 49 Stat. 2031, 2032; Act of June 17, 1957, 71 Stat. 83, 140-141; Act of Sept. 2, 1958, 72 Stat. 1105, 1239.

Association of Radiation Survivors v. *Walters,* 589 F. Supp. 1302 (N.D. Calif. 1984). The Government filed direct appeal here, obtained a stay of the injunction, and this Court on December 10, 1984 noted probable jurisdiction.

SUMMARY OF ARGUMENT

The $10 attorney fee limit, first adopted during the Civil War, was intended by Congress as compensation for relatively simple work and to protect those "who have borne the battle and their widows and orphans" against exorbitant fees by unscrupulous attorneys who were then subject to little, if any, regulation. When the fee limit was adopted, and for most of the Nineteenth Century, it was not grossly unfair. But the vast changes in our society since then dramatically altered the impact of that fee limit and made it totally unjustified now. The maximum $10 fee is no longer compensatory for virtually all kinds of legal assistance on a claim for veterans benefits, and that limit now constitutes a complete bar to any legal work that is not purely *pro bono.* Moreover, attorneys are now subject to standards of professional conduct which are far more effective than the $10 fee limit to prevent overreaching of clients whom they serve. Furthermore, the law, regulations, and procedures relating to veterans benefits have in many cases become intricate. The assistance which claimants for such benefits can get from VA staff and lay representatives of veterans organizations is inadequate in cases involving complex legal or factual issues, resulting in denial of statutory benefits which could have been obtained with adequate legal counsel.

This Court has often ruled that persons claiming statutory benefits have constitutional rights, based on the First and Fifth (and in state cases, on the Fourteenth) Amendments, to choose and use legal counsel to assist them on their statutory claims. Since the $10 fee limit destroys those rights, that limitation is unconstitutional.

This Court's summary affirmance almost 10 years ago in the *Gendron* case does not control this case. The case now before this Court presents extensive evidence about the complexity and adversarial nature of VA claim cases, and the inadequacy, particularly in complex cases, of the assistance available from VA staff and the lay representatives of veterans organizations. No such evidence was presented in the *Gendron* case, nor did the *Gendron* applicant show how the $10 fee limit adversely affected him, or even allege that any assistance available from lay representatives of veterans organizations would have been inadequate in his case. Nor did the *Gendron* case, unlike the present case, involve either a challenge to the $10 fee limit as being in violation of the First Amendment right to counsel, or a District Court finding and ruling to that effect.

The *Reese* case (see Part V, *infra*) dramatically illustrates how a veteran's widow, whose claim for statutory benefits was denied five times by VA, while she was being assisted by lay representatives of veterans organizations, finally had her claim approved when she obtained the *pro bono* services of a competent attorney who felt that VA's denials were unjust.

ARGUMENT

1. THE PRESENT $10 ATTORNEY FEE LIMIT, EVEN IF IT HAD A JUSTIFIABLE PURPOSE WHEN FIRST ADOPTED DURING THE CIVIL WAR, IS UNJUSTIFIABLE NOW.

In adopting the attorney fee restriction, Congress was motivated principally by apprehension that unscrupulous attorneys would charge exorbitant fees for helping to prepare applications and affidavits in relatively simple pension claim cases. *Smith v. United States,* 83 F.2d 631, 640 (8th Cir. 1936). It set the fee limit at a level that was

relatively fair for such work in most of the Nineteenth Century.

For example, in 1880, average wages were $2.26 per day for skilled workers, and $1.32 per day for laborers.[5] In 1909, production workers in manufacturing had average earnings of 19 cents per hour,[6] compared to $9.17 per hour in 1984.[7] Military basic pay for all personnel averaged $231 annually in 1865,[8] compared to $12,800 annually in 1983.[9] The suggested attorneys' fee schedule adopted in 1873 by the District of Columbia Bar Association dramatically illustrates the difference in attorney fee structure between then and now:[10]

Arguing a case in the Supreme Court of the District of Columbia	$50
Representing a client in a federal circuit court trial	$25
Representing a client in a police court trial	$10
Preparing a written contract or deed	$10
Preparing a will	$25
Examination of title abstract	$25
Collections	Ten percent of first $5,000, and five percent of the excess.

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[5]U.S. Dept. of Commerce, "Historical Statistics of the United States", Part 1, p. 165 (1975).

[6]*Ibid.*, p. 170.

[7]Economic Report of the President, H. Doc. 99-19, transmitted to Congress February, 1985. p. 276.

[8]U.S. Dept. of Commerce, "Historical Statistics of the United States", Part 1, p. 176 (1975).

[9]Statistical Abstract of the United States, 1984, p. 357.

[10]Harry J. Lambeth, "Practicing Law in 1878", 64 Amer. Bar Assoc. Journal, 1014, 1021-1022 (July, 1978).

Massive economic changes in the past century have eroded the value of $10 to a mere fraction of its Nineteenth Century worth. Today, no applicant for VA-administered benefits can obtain legal assistance under the $10 fee limit, except from a lawyer willing to donate his or her services. New veterans benefit laws with complex requirements and conditions have been enacted. VA procedures and rules, like those of other governmental agencies, have become intricate. In addition, many VA claims now require proof of disabilities resulting from complex radiological, chemical and psychological causes.

Thus, the $10 fee limit, which Congress set as a fair compensation for a simple type of service, has drastically changed over the past 100 years. It is now an almost absolute prohibition against the exercise of the constitutional right of veterans and their dependents and survivors to obtain legal counsel for the assistance needed, in many of the now complex VA administrative proceedings, to get the statutory benefits Congress intended them to have.

In addition, the major reason Congress enacted the fee limitation no longer exists. Congress intended the limitation to protect veterans statutory benefits from erosion by exorbitant fees of unscrupulous attorneys and agents who were largely unregulated in the Nineteenth Century. That situation has markedly changed. Legal standards of professional responsibility and conduct were developed and adopted in the Twentieth Century which now regulate lawyers' actions and ethics in relation to their clients. These legal standards provide methods of protecting against overreaching of veterans by attorneys that are more substantial, more flexible, and far less drastic than the statutory $10 fee limitation method which virtually destroys the constitutional rights to due process of law and to select and use legal counsel to assist on one's legal claims.

These changes alone make it clear that the present fee limitation no longer serves, if it ever did serve, the government's asserted interest in establishing the fee limit. But there have also been great changes in other aspects of the veterans benefits programs, which emphasize that there is no substantial basis and therefore no justification for continuing to allow that fee limit to negate fundamental constitutional rights.

Circumstances pertaining to life and health, as well as the law and agency regulations and procedures relating to veterans and their benefits, have become increasingly complex in recent decades. Many, perhaps most, potential claimants for statutory veterans benefits need assistance to present adequately the factual and legal basis of their claims. To deny them the opportunity to have such assistance is equivalent to denying them the benefits which Congress contemplated they should receive.

The extensive discovery proceedings in this case contain substantial evidence to support the following:

—that VA proceedings are often adversarial between applicants and VA;

—that the assistance provided to applicants by VA staff, and by the representatives (virtually none of whom are attorneys) of the veterans organizations, is frequently minimal or solely clerical;

—that such assistance is often not equivalent to the assistance which could be provided by attorneys from outside VA;

—that VA laws, regulations and procedures governing veterans claims are often complex;

—that many claims for veterans benefits involve technical and scientific matters, medical causation, multiple etiology, and complex issues of law and fact;

—that many of the rules or guidelines governing VA procedures are unpublished and not available to applicants;

—that VA staff frequently press claimants to waive their procedural rights;

—that relatively few applicants have the resources or knowiedge to obtain and to present documentary and oral evidence adequately at hearings, and to utilize their administrative and appeal rights properly;

—that many claims are abandoned either unknowingly or because the potential claimant simply is unable to obtain legal counsel.

The statutory prohibition against judicial review of VA decisions, which makes the administrative stage the all-important stage for determining whether the claimants will receive the statutory benefits they seek, also makes it "especially crucial that the VA's...procedures guarantee the degree of accuracy and fairness we expect of governmental processes." *Devine* v. *Cleland,* 616 F.2d 1080, 1088 (9th Cir. 1980). But the $10 fee restriction effectively precludes the claimants from obtaining needed legal assistance except in rare cases, and thus results in denying such assistance to the claimants. In the circumstances which produce the need for such assistance, the $10 fee restriction thus results in denying such claimants their constitutional rights to counsel.

Declaring the $10 fee limit to be unconstitutional will not require claimants for veterans benefits to hire an attorney, because they could choose not to do so and to proceed as they do now (either *pro se* or relying on VA staff or lay representatives of veterans organizations). Declaring the $10 fee limit unconstitutional would simply enable the claimants, if they desire the assistance of legal counsel, to exercise their constitutional rights to choose and use legal counsel to assist them in seeking the statutory benefits Congress intended them to have.

II. THE CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS INCLUDES THE RIGHT NOT TO BE DENIED THE ASSISTANCE OF COUNSEL IN PROCEEDINGS BEFORE GOVERNMENT AGENCIES DECIDING AN INDIVIDUAL'S CLAIM FOR STATUTORY BENEFITS.

This Court ruled in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) that persons entitled to statutory welfare benefits are entitled to procedural due process of law in adjudication of their rights to benefits, including the rights to a hearing and to be allowed to obtain an attorney's assistance.[11] This Court pithily delineated

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[11]Numerous decisions have held that applicants for statutory benefits have a "property" interest therein sufficient to invoke protection of the Due Process Clause of the Constitution. *Ressler* v. *Pierce,* 692 F. 2d 1212, 1214-1216 (9th Cir. 1982) (applicants for subsidized housing); *Kelly* v. *Railroad Retirement Board,* 625 F. 2d 486, 489-490 (3rd Cir. 1980) (disability compensation under Railroad Retirement Act); *Devine* v. *Cleland,* 616 F. 2nd 1080, 1086 (9th Cir. 1980) (student-veteran receiving VA educational benefits); *Griffeth* v. *Detrich,* 603 F. 2d 118, 120-122 (3rd Cir. 1978), *cert. den. sub nom. Peer v. Griffeth,* 445 U.S. 970 (1980) (State Welfare benefits); *Wright v. Califano,* 578 F.2d 345, 354 (7th Cir. 1978) (Social Security benefits); *Elliott v. Weinberger,* 564 F.2d 1219, 1230 (9th Cir. 1977), modified on other grounds sub nom, Califano v. Yamasaki, 442 U.S. 682 (1979) (Social Security benefits); *Tatum v. Matthews,* 541 F.2d 161, 164 (6th Cir. 1979) (benefits for permanent and total disability); *Caulder v. Durham Housing Authority,* 433 F.2d 998, 1004 (4th Cir. 1970), *cert. den.,* 401 U.S. 1003 (1971) (tenant in publicly subsidized low-rent housing); *Davis v. United States,* 415 F. Supp. 1066, 1090-1092, 1095-1096 (D. Kans. 1976) (disability compensation for injuries while employed in prision hospital); *Plato v. Roudebush,* 397 F. Supp. 1295, 1303, (D. Md. 1975) (veterans pension benefits); *Shaw v. Weinberger,* 395 F. Supp. 268, 270-271 (W.D., N. Car 1975) (Supplemental Social Security benefits); *Barnett v. Lindsay,* 319 F. Supp. 610, 612 (D. Utah 1970) (welfare benefits).

the constitutional right to due process in that case, as follows (at pp. 270-271):

> " 'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' *Powell* v. *Alabama,* 287 U.S. 45, 68-69 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing."

The fundamental nature of this basic principle is evident from Justice Sutherland's words more than 50 years ago in *Powell* v. *Alabama,* 287 U.S. 45, 69 (1932), as follows:

> "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

III. THE FIRST AMENDMENT RIGHTS OF FREEDOM OF SPEECH AND ASSOCIATION, AND TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES, ARE IMPAIRED WHEN PERSONS FOR WHOM STATUTORY BENEFITS ARE INTENDED ARE PREVENTED BY LAW OR GOVERNMENTAL ACTION FROM CHOOSING AND USING QUALIFIED LEGAL COUNSEL TO ASSIST THEM IN SEEKING THOSE BENEFITS.

This Court has repeatedly noted that lawyers are "necessities, not luxuries" because "the services of a lawyer will for virtually every layman be necessary to" adequately assist or defend their rights in our system of law and governmental regulation.[12] This Court has therefore many times held that impending access to legal counsel violates the First Amendment to our Constitution. Among these cases are:

NAACP v. *Button,* 371 U.S. 415 (1963), invalidating state ban on solicitation of attorneys to assist persons in civil rights matters.

Brotherhood of Railroad Trainmen v. *Virginia State Bar,* 377 U.S. 1 (1944), holding that a state court injunction prohibiting a union from recommending specific lawyers to its members to handle their injury claims infringes the First Amendment.

United Mineworkers v. *Illinois Bar Association,* 389 U.S. 217 (1967), holding that a state court injunction preventing a union from employing lawyers to represent its members seeking statutory benefits violates the constitutional protection of the freedom of speech, assembly and petition provisions of the First Amendment.

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[12] *Evitts v. Lucey,* ____ U.S. ____, 53 U.S. Law Week 4101, 4103 (January 21, 1985) (holding that the right to counsel includes the right to have effective assistance of counsel), and citing *Andrews* v. *California,* 386 U.S. 738 (1976) and *Entsminger* v. *Iowa,* 386 U.S. 748 (1967).

United Transportation Union v. *State Bar of Michigan,* 401 U.S. 576 (1971), holding that a state court injunction barring a union from providing legal services to its members and accepting compensation for solicitation of legal employment violates the First and Fourteenth Amendments protecting the right to obtain lawyers for meaningful access to the courts.

Bounds v. *Smith,* 430 U.S. 817 (1977), upholding a prisoner's right to have access to lawyers.

Bates v. *State Bar of Arizona,* 433 U.S. 350 (1977), invalidating a ban on advertising by lawyers of their fees.

In sum, it is ironic and unfair that veterans (and their spouses and dependents), who staked their lives and health in fighting to preserve the Bill of Rights and its guarantee of legal counsel which it protects for virtually all others, are denied the right to choose and use legal counsel to help them obtain the statutory benefits Congress intended them to have.

IV. THE *GENDRON* AFFIRMANCE DOES NOT FORECLOSE AFFIRMANCE OF THE DISTRICT COURT'S DECISION IN THIS CASE.

The applicant for VA benefits in the *Gendron* case challenged the constitutionality of the $10 attorney fee limit, but the District Court rejected his challenge and this Court affirmed *per curiam.* [13] But that affirmance does not prevent affirmance of this case, which is very different. The applicant in *Gendron* produced no evidence that the $10 fee limit adversely affected him, and did not even allege that the aid he could have received from representatives of veterans organizations was inadequate. Moreover, the appellees in the case now before this Court presented extensive evidence concerning the complexity and adversarial nature of the issues and procedures in many VA claim cases requiring

[13] *Gendron v. Saxbe,* 389 F. Supp. 1303 (C.D. Calif. 1975), aff'd per curiam *sub nom. Gendron v. Levi,* 423 U.S. 802 (1975).

assistance of an attorney, the inadequacy of assistance provided to claimants by VA staff and lay representatives of veterans organizations in complex cases, and the adverse impact of the $10 fee limit on the claimants for VA benefits in this case. Since a Due Process challenge must be judged in light of the circumstances to which it relates, it is plain that the *Gendron* case did not adequately present such a challenge. In this case, however, the District Court fully considered and weighed the extensive evidence pertinent to such a challenge and upheld the challenge on the basis of such evidence. Moreover, unlike this case, the *Gendron* case did not involve or rule upon a challenge to the constitutionality of the $10 attorney fee limit as a violation of the First Amendment right to counsel.

V. THE *REESE* CASE IN THE VA ILLUSTRATES HOW A COMPETENT ATTORNEY CAN PROVIDE MUCH BETTER ASSISTANCE, IN A COMPLEX VA CASE, THAN IS FURNISHED BY LAY REPRESENTATIVES OF VETERANS ORGANIZATIONS, AND CAN MAKE THE DIFFERENCE BETWEEN A CLAIMANT'S OBTAINING, OR BEING DENIED, THE STATUTORY BENEFITS INTENDED BY CONGRESS.

Lt. Col. Joseph W. Reese, who was decorated for bravery in the Vietnam War, retired after 20 years of active military service. His wartime experiences in Vietnam had caused him to become an alcoholic. One year and 62 days after his release from active duty, he was hospitalized and diagnosed as having alcoholic cirrhosis of the liver. He died in February 1979, of gastrointestinal hemorrage due to his alcoholic liver cirrhosis. In March, 1979, his widow, Mrs. Jackie D. Reese, filed application (XC 28 733 518) for survivor benefits (38 U.S. Code, Ch. 13), asserting that the condition causing his death occurred during his military

service, and certainly during the presumptive one-year period after his release from active. duty. 38 U.S. Code 312(a)(1).

VA denied Mrs. Reese's claim five times[14] between 1980 and 1984, asserting that the diagnosis of alcoholic liver cirrhosis was made 62 days after the presumptive one-year period and that there was inadequate proof that the cirrhosis existed either during Col. Reese's military service or the presumptive period. All of these decisions were made without oral hearings except one in December 1982 which lasted 26 minutes and consisted of testimony by Mrs. Reese and her mother, and argument by a lay representative of a veterans' organization.

Mrs. Reese could afford hiring an attorney but was repeatedly told by VA staff and the representatives of the VA-recognized veterans organizations who assisted her that she did not need an attorney and would be better served by the lay representatives. She also could afford the cost of obtaining medical experts to testify at a hearing to prove that the cirrhosis condition which caused her husband's death existed during his military service or within the following year. Neither VA staff nor the representatives of the two veterans organizations[15] to which she entrusted her case suggested obtaining such expert witnesses to testify at the hearing..

When her sixth appeal was filed and a hearing set for July 1984, Mrs. Reese asked an attorney (himself a veteran and a longtime private practitioner) to review her case. Because he felt that a grave injustice had been inflicted on her, he

[14]July 2, 1980; Feb. 6, 1981; Jan. 8, 1982; Mar. 30, 1982; and Jan. 13. 1983. *Case of Joseph W. Reese* (XC 28 733 518).

[15]Initially, four different lay representatives of one veterans organization aided her, but after they lost their file of the case, she was aided by two different representatives of another veterans organization.

agreed to handle her case *pro bono*. He obtained and presented four medical experts, as well as other witnesses and other evidence concerning Col. Reese's health, habits, and cause of death, which had not previously been presented, and argued her case before the VA Board of Appeals. On November 26, 1984, the Board ruled that Col. Reese incurred his liver cirrhosis while in military service and that such service-connected disease or disability did cause or contribute to his death, and thus that his surviving spouse was entitled to the pension benefit for which she had applied almost six years earlier.

It is clear (1) that Mrs. Reese won on her sixth effort only because she was aided by a competent attorney with experience in presenting evidence in difficult and complex cases; (2) that if her sixth effort had been presented by lay representatives of a veterans organization as had been done previously, her claim would have been again denied; and (3) that if a competent attorney had represented her at the earlier presentations, she would have received her pension entitlement five years earlier.

In sum, competent legal counsel, particularly in complex cases, can make the difference between obtaining, or being denied, the statutory service-connected benefits that Congress intended. The $10 attorney fee limitation virtually bars the opportunity to obtain competent legal counsel, except in the rare instances where the claimant can obtain a *pro bono* attorney. Thus, that fee restriction gravely, and unnecessarily, hampers the claimant's ability to obtain the Congressionally-intended statutory benefits, and violates the claimant's constitutional rights to counsel and to due process of law.

CONCLUSION

The District Court's judgment, holding the $10-fee limit in 38 U.S. Code 3404(c) and 3405 unconstitutional and enjoining its enforcement, should be affirmed.

Respectfully presented

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FOR ARGUMENT

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, Administrator of Veterans' Affairs, et al., *Appellants,*

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al., *Appellees.*

On Appeal Fr[illegible]
The United States D[illegible] Court
for the Northern District of California

BRIEF FOR THE NATIONAL ASSOCIATION OF ATOMIC VETERANS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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37 pp

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Statement of the Case	2
Summary of Argument	6
Argument	8
I. The $10 fee limit effectively precludes SCDD claimants from consulting attorneys in developing and presenting their V.A. claims and thereby deprives them of procedural due process	8
A. SCDD applicants, like recipients, have a property interest in the expected receipt of compensation	8
B. The freedom to retain counsel is an important element of procedural due process in V.A. adjudications	12
C. Assistance from V.A. personnel and service organizations cannot substitute for professional legal assistance	20
D. The interests of V.A. claimants in a fair presentation of their claims and access to legal advice far outweigh the asserted governmental interests	22
II. The $10 fee limit impermissibly infringes claimants' First Amendment rights of petition and access to justice	25
A. An application for SCDD benefits constitutes an exercise of the right of petition, and the fee limit impairs the exercise of that right and the right of access to justice	25
B. This serious infringement of the First Amendment right of petition cannot be justified because the statutes advance no substantial government interest and, in any event, are overbroad	29
Conclusion	30

TABLE OF AUTHORITIES

Cases

	Pages
Agent Orange Product Liability Litigation, In re, 597 F. Supp. 740	15
Alexander v. Silverman, 356 F. Supp. 1179	10
American Civil Liberties Union of New Jersey v. New Jersey Election Law Enforcement Commission, 509 F. Supp. 1123	29
Armstrong v. Manzo, 380 U.S. 545	12
Barnett v. Lindsay, 319 F. Supp. 610	10, 18
Batchelder v. Kenton, 383 F. Supp. 299	18
Baxter v. Palmigiano, 425 U.S. 308	19
Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040	18
Board of Regents v. Roth, 408 U.S. 564	11, 23
Boddie v. Connecticut, 401 U.S. 371	14, 27, 28
Bounds v. Smith, 430 U.S. 817	27
Brotherhood of Railroad Trainmen v. Virginia State Bar, 377 U.S. 1	26
Buckley v. Valeo, 424 U.S. 1	28, 29
Calhoun v. Massie, 253 U.S. 170	12
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508	25, 26, 28
Capital Trust Co. v. Calhoun, 250 U.S. 208	12
Caulder v. Durham Housing Authority, 433 F.2d 998, cert. denied, 401 U.S. 1003	18
Citizens Energy Coalition of Indiana, Inc. v. Sendak, 459 F. Supp. 248, aff'd, 594 F.2d 1158	29
Clean-up '84 v. Heinrich, 582 F. Supp. 125	28
Crook v. Baker, 584 F. Supp. 1531	18
Cruz v. Beto, 405 U.S. 319	26
Daniels v. Woodbury County, Iowa, 742 F.2d 1128	10
Davis v. Toledo Metropolitan Housing Authority, 311 F. Supp. 795	10
Davis v. United States, 415 F. Supp. 1086	10, 18
Demarest v. United States, 718 F.2d 964, cert. denied, 104 S.Ct. 2150	11
Devine v. Cleland, 616 F.2d 1080	9
Edelman v. Jordan, 415 U.S. 651	11
Feinberg v. Federal Deposit Insurance Corp., 420 F. Supp. 109	18
Feres v. United States, 340 U.S. 135	18

	Pages
Ferguson v. Metropolitain Development & Housing Agency, 485 F. Supp. 517	18
Frisbie v. United States, 157 U.S. 160	12
Fuentes v. Shevin, 407 U.S. 67	12, 25
Gagnon v. Scarpelli, 411 U.S. 778	16
Gault, In re, 387 U.S. 1	16, 18
Gendron v. Saxbe, 389 F. Supp. 1303, aff'd mem. sub nom. Gendron v. Levi, 423 U.S. 802	10-11
Geneva Towers Tenants Organization v. Federated Mortgage Investors, 504 F.2d 483	10
Gilmore v. Lynch, 319 F. Supp. 105, aff'd per curiam sub nom. Younger v. Gilmore, 404 U.S. 15	27
Givens v. Poe, 346 F. Supp. 202	18
Goldberg v. Kelly, 397 U.S. 254	8, passim
Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117	9
Goss v. Lopez, 419 U.S. 565	11, 19, 23
Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1	9
Griffeth v. Detrich, 603 F.2d 118, cert. denied 445 U.S. 970	9-10
Hines v. Lowrey, 305 U.S. 85	12
Hudson v. Palmer, 104 S.Ct. 3194	26
Indiana Planned Parenthood v. Pearson, 716 F.2d 1127	18
Jeanette Rankin Brigade v. Chief of Capitol Police, 342 F. Supp. 575, aff'd mem., 409 U.S. 972	28
Johnson v. Avery, 393 U.S. 483	27
Kelly v. Railway Retirement Board, 625 F.2d 486	10
Logan v. Zimmerman Brush Co., 455 U.S. 422	9
Margolin v. United States, 269 U.S. 93	12
Mathews v. Eldridge, 424 U.S. 319	8, passim
Middendorf v. Henry, 425 U.S. 25	17
Milhouse v. Carlson, 652 F.2d 371	26
Moffett v. Killian, 360 F. Supp. 228	28
Morrissey v. Brewer, 408 U.S. 471	12
NAACP v. Button, 371 U.S. 415	26, 29
Nelson v. Dysart, 267 U.S. 540	12
Newman v. Moyers, 253 U.S. 182	12
Perry v. Sindermann, 408 U.S. 593	11
Pizzolato v. Perez, 524 F. Supp. 914	26
Plato v. Roudebush, 397 F. Supp. 1295	9

	Pages
Potashnick v. Port City Construction Co., 609 F.2d 1101, cert. denied, 449 U.S. 820	19
Powell v. Alabama, 287 U.S. 45	15, 19
Primus, In re, 436 U.S. 412	26, 29
Ressler v. Pierce, 692 F.2d 1212	10, 18
Ryland v. Shapiro, 708 F.2d 967	28
Schware v. Board of Bar Examiners, 353 U.S. 232	9
Shaw v. Weinberger, 395 F. Supp. 268	10
Specht v. Patterson, 386 U.S. 605	18
Stanley v. Illinois, 405 U.S. 645	25
Staub v. Roudebush, 424 F. Supp. 1346, vacated and remanded, 574 F. 2d 637	29
Thomas v. Collins, 323 U.S. 516	29
United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217	26, 29
United States v. Hall, 98 U.S. 343	12
United Transportation Union v. State Bar of Michigan, 401 U.S. 576	26
Wilson v. Thompson, 593 F.2d 1375	26
Wolff v. McDonnell, 418 U.S. 539	12, 19, 27
Wright v. Califano, 587 F.2d 345	10
Vitek v. Jones, 445 U.S. 480	16-17

Constitutions

U. S. Constitution	
First Amendment	7, passim
Fifth Amendment (Due Process Clause)	12, 14, 25, 27

Federal Statutes

United States Code	
5 U.S.C. § 555(b)	19
8 U.S.C. § 1362	19
10 U.S.C. § 1553(c)	19
18 U.S.C. § 4208(2)	19
38 U.S.C. § 211(a)	18
38 U.S.C. §§ 301-423	10
38 U.S.C. § 310	10
38 U.S.C. §§ 311-313	13
38 U.S.C. § 312	13
38 U.S.C. § 321	10
38 U.S.C. § 331	10
38 U.S.C. § 333	13

	Pages
38 U.S.C. § 337	13
38 U.S.C. § 341	10
38 U.S.C. § 353	13
38 U.S.C. § 354	13
38 U.S.C. §§ 3404-3405	2, 30
Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984)	20

Federal Regulations

Code of Federal Regulations	
Title 5 § 771.302(c)(2)	19
Title 20 §§ 404.950(a)	16, 19
Title 20 §§ 404.1705(a)	16, 19
Title 38 § 3.102	13, 16
Title 38 § 3.103(a)	20
Title 38 § 3.103(b)	13
Title 38 § 19.121(b)(3)	13
Title 38 § 19.123(a)	13

Legislative Materials

S. Rep. No. 97-466, 97th Cong., 2d Sess. (1982)	6, 15
S. Rep. No. 98-130, 98th Cong., 1st Sess. (1983)	25

Other Authorities

Speech of John Quincy Adams Upon the Right of the People to Petition (1838), *reprinted in* The Anti-Slavery Crusade in America (J. McPherson & W. Katz eds. 1969)	26

No. 84-571

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On Appeal from
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BRIEF FOR THE NATIONAL ASSOCIATION OF ATOMIC VETERANS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

THE INTEREST OF AMICUS CURIAE[1]

The National Association of Atomic Veterans ("NAAV") is a nationwide membership organization composed primarily of U.S. veterans exposed to atomic radiation during military service ("atomic veterans"), their families and their survivors. Its co-founder, Orville Kelly, was one of the few American veterans ever determined by the Veterans Administration ("V.A.") to be

[1] Pursuant to Supreme Court Rule 36.2, NAAV requested and was granted permission by counsel for all parties to file this brief, and letters of consent will be filed concurrently herewith.

entitled to service-connected disability compensation for a radiation-related disability. Establishing his entitlement consumed seven years of his life. Seven months later, Kelly died.

Kelly's experience with the V.A. alerted him to the almost insurmountable barriers faced by atomic veterans in proving their entitlement to compensation. In response, he and his wife founded NAAV as a non-profit organization[2] dedicated to promoting the interests of atomic veterans, especially helping them establish entitlement to V.A. compensation for radiation-related disabilities.

Many of NAAV's members are severely disabled, some terminally ill, and many are recipients of service-connected death and disability ("SCDD") compensation, but very few receive SCDD compensation for radiation-related disabilities. Many have applied for compensation for the radiation-related injuries they have suffered, but the $10 attorneys' fee limitation under 38 U.S.C. §§ 3404-3405 has prevented them from presenting their claims in a meaningful way, and their applications have been denied. Many other members of NAAV have been deterred from applying due to the evident futility of doing so. On behalf of its members, and especially on behalf of unsuccessful applicants and potential applicants for SCDD compensation, NAAV presents its views as *amicus curiae*, and joins the Appellees in urging affirmance of the district court's order.

STATEMENT OF THE CASE

The operation of the V.A. claims adjudication system is accurately described in the district court's opinion (J.S.App. 28a-38a) and in Appellees' Brief at 2-20. NAAV joins in Appellees' Statement of the Case. However, we add the following further statement of facts about the individual Appellees:

In December 1940, Appellee Albert Maxwell, then 21 years old, was inducted into the Army (J.A. 46). When Pearl Harbor was attacked, Maxwell was stationed in the Philippines (J.A. 46). He fought in the Battle of Bataan from December 1941 until Bataan fell in April 1942 (J.A. 46-47). Maxwell was one of

[2] NAAV gratefully acknowledges the services and materials provided free of charge by Jeffries Banknote Co. in connection with the printing of this brief.

approximately 5,000 survivors of the 22,000 soldiers in the Bataan Death March (J.A. 21, 48-49). He was held as a prisoner of war in the Philippines (J.A. 48-49), and was confined for a time in a Philippine prison under sentence of death (J.A. 49). His death sentence was commuted as he stood before the firing squad (J.A. 49). He was later herded, along with 1,100 other prisoners, into the hold of a "hell ship" destined for Japan (J.A. 21, 49). The ship was torpedoed and sunk, and Maxwell was among the 52 survivors picked up by a Japanese merchantman (J.A. 21).

Maxwell was eventually imprisoned in a POW camp near Nagoya, Japan (J.A. 50), 65-80 miles from Hiroshima (J.A. 51, 67). He was still there when Hiroshima and Nagasaki were bombed, and he was puzzled by the "black rain," which he later learned was nuclear fallout (J.A. 51, 66, 67). A few days after the bombing, Maxwell was sent into Hiroshima to clear debris from the roads (J.A. 51, 67). Maxwell used his bare hands as tools and wore no protective clothing (J.A. 67). He drank the water in the bombed areas and ate food cooked in the open (J.A. 67). About seven to ten days after he began to work on the clean-up detail, he developed nausea and itching, welts, blisters and a rash covering his arms and legs (J.A. 51, 67). In September 1945 his POW camp was liberated by United States Marines (J.A. 51). Maxwell, who is 6'3" tall, weighed 89 pounds (J.A. 52).

After his return to the United States, Maxwell intended to make a career of the Army, but was medically discharged in 1947 with a 50% disability rating, later reduced to 40% (J.A. 82), for residuals of beriberi, malaria, shrapnel injury to the right ankle, optic atrophy, conjunctivitis and diminishing eyesight of the left eye (J.A. 22, 54-56).

Maxwell and his wife had five children, born between 1948 and 1961 (J.A. 57-61, 76-77). Four of the five children died in infancy or early childhood due to rare congenital diseases which family doctors believe were associated with Maxwell's exposure to radiation (J.A. 57-61, 70-71, 76-77).

In 1981, Maxwell was diagnosed as having multiple myelomas, a rare form of bone cancer which the Federal Government has identified as "meaningfully" associated with exposure to radiation (J.A. 67). His doctor believes that his cancer is related to his exposure to radiation in Japan during World War II (J.A. 67-68). Maxwell filed a claim with the V.A. to increase his disability rating to 100% on the basis of his multiple myelomas and other medical problems (J.A. 74-77, 79-80, 83-86). He asked an attorney to represent him in connection with his V.A. claim, but the attorney declined because of the $10 limitation on attorneys' fees (J.A. 312-314). The V.A. denied Maxwell's claim, giving as the sole reason:

> "The medical evidence of record would not support a grant of service connection for the disabilities of multiple myelomas, a degenerative joint disease, or a peptic ulcer. An increase in the evaluation of your disabilities already established as service connected is not warranted" (J.A. 81).

This, or a very similarly worded "reason" for denial is, in fact, a stock paragraph used by the V.A. in explaining denials of benefits (J.A. 95, 386).

Maxwell has been able to work only sporadically since 1978 (J.A. 80, 307), and not at all since 1983 (J.A. 84-85, 308). He has now spent his life's savings and has been forced to sell his home and declare bankruptcy (J.A. 322-323). He is 64 years old, and both he and his wife depend on his SCDD compensation for their modest existence (J.A. 46, 322).

Unfortunately, Maxwell's experience is not an isolated case. The other individual Appellees have suffered equally tragic consequences of atomic radiation exposure. Appellee Reason Warehime is a thrice-wounded World War II and Korean War veteran who was among the occupational forces that entered Nagasaki on a clean-up detail in August 1945 (J.A. 195). In 1953, Warehime was assigned to duty at an atomic bomb test site in Arizona, and was positioned in a trench located a mere 2,000 yards from ground zero (J.A. 196). He and the men under his command were actually located in the "stem" of the mushroom cloud that resulted from the blast (J.A. 196). The heat was so intense that objects at the edge of the trench were

reduced to charcoal (J.A. 196). The men in the trench were surrounded by a "dense fog" of radioactive fallout, and they immediately became nauseous (J.A. 196). After the blast, and pursuant to orders from his superiors, Warehime ordered his men to advance to ground zero (J.A. 196). Several months later, Warehime lost all of his body hair (J.A. 196).

Warehime now suffers from osteoporosis of the bone, muscle atrophy, sterility, cataracts and lung cancer, which he believes were caused by his exposure to radiation (J.A. 196). His left lung was surgically removed in 1982 (J.A. 196). He is confined to a wheelchair, is partially paralyzed, and is blind in one eye (J.A. 24, 196). Warehime received a 30% disability rating from the V.A. for conditions unrelated to his exposure to radiation (J.A. 196-197). He has filed several claims for his radiation-related disabilities, which consistently have been denied (J.A. 197). His most recent claim was filed in 1980 (J.A. 197). Nearly five years later, after numerous hearings, decisions, reversals, remands and deliberations, that claim is still pending (J.A. 197). Warehime has been unable to hire a private attorney to help him pursue his claim because of the $10 fee limit (J.A. 198). Both he and his wife live solely on the $549 per month that he receives from the V.A. (J.A. 199).

Appellee Doris Wilson is the widow of a seaman who was exposed to radiation while assigned to a series of ships involved in atomic testing in the Pacific Theatre between 1943 and 1947 (J.A. 25, 216). During one of those tests, several men on board lost their hair and others became nauseated (J.A. 216). The officers and crew were disturbed by their inability to decontaminate the ship (J.A. 216). Wilson's husband died of pancreatic cancer in 1980 and, based on her belief that his death was caused by his exposure to radiation in the military, Wilson applied for V.A. benefits (J.A. 216). Her application was denied (J.A. 216). Wilson, too, was unable to obtain legal assistance due to the fee limitation (J.A. 217).[3]

---

[3] The late Don Cordray, a plaintiff when this litigation began, did not live to see the case reach the Supreme Court. He succumbed to oat cell carcinoma in March 1984. During Operation Crossroads in Bikini in 1946, he had witnessed tests Able and Baker from the deck of the USS Fulton, where he and

(footnote continued on next page)

SUMMARY OF ARGUMENT

The V.A. is the only agency in the country empowered to compensate veterans and their survivors for disability or death resulting from military service. Under the *Feres* doctrine, veterans cannot sue for such disabilities under the Federal Tort Claims Act. Moreover, decisions of the V.A. are absolutely final; judicial review is prohibited by statute.

By the V.A.'s own admission, the $10 fee limitation "effectively precludes attorney representation before the V.A." S. Rep. No. 97-466, 97th Cong., 2d Sess. 102 (1982). So sweeping is its application that it not only precludes V.A. claimants from securing representation by attorneys in V.A. hearings, but also prevents them from obtaining legal advice in the investigation, development and preparation of their claims. The statute likewise precludes attorney representation in V.A. appeals, even though such appeals constitute a final determination on the merits.

The problem is most serious in complex cases, such as atomic veteran, Agent Orange and post-traumatic stress disorder ("PTSD") claims, where proof of causation is especially difficult. Effective presentation of such claims would routinely require legal, scientific and medical research, development of statistical data, acquisition of information concerning the disposition of similar claims, physical examination by medical specialists and the testimony of medical experts.

Even in less complex cases, the V.A. application and appeal procedures are difficult for a layman to grasp. Claimants are commonly required to call witnesses on their behalf and to gather and present medical data and other documentary evidence to prove the existence of a disability, its causation and

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18 others had been positioned as "guinea pigs" (J.A. 146). The Fulton was ordered to move in immediately after blast Able to recover scientific test materials from the target ships (J.A. 20, 146). Cordray was aboard the Fulton when it towed one of the target ships to Pearl Harbor (J.A. 147). He remained aboard for over three months after the blasts, while the ship was highly contaminated with radiation (J.A. 147). Before his death, Cordray had applied for service-connected disability benefits. He received a 10% disability rating for a condition unrelated to his radiation exposure (J.A. 147, 150), but continued to press for increased benefits for his oat cell carcinoma and related conditions. His radiation-related claims were denied (J.A. 147-149) .

the degree of impairment. Legal points, such as presumptions of service-connection, often dictate the outcome of an application, yet claimants have no recourse to professional advice in understanding such legalities. And, too, applicants are often severely disabled, which makes self-representation all the more difficult and ineffective. Though free assistance is available from service organization representatives, this assistance is inadequate due to heavy caseloads and lack of legal training.

The district court correctly held that this virtual prohibition on the participation of attorneys in the claims process denies claimants procedural due process and violates their First Amendment rights of petition and association. This Court should affirm that decision.

The criteria for entitlement to SCDD compensation are objectively defined by statute, and the award of benefits is not discretionary. These factors make such benefits a matter of statutory entitlement and create a protectible property interest for applicants for SCDD compensation, as well as for its recipients. Indeed, it is especially important that applicants be afforded procedural safeguards in the claims process, since it is most often at this initial adjudicatory stage that benefits are denied in complicated or controversial cases.

The freedom to retain counsel for advice concerning one's legal rights is fundamental, and cannot lightly be stripped away. It is one of the means by which individuals may shield themselves from arbitrary government action. Moreover, the value of attorneys in adjudicative proceedings, however "informal," has often been recognized by this Court. Representation by retained counsel is uniformly allowed in similar benefit adjudication schemes, either as a matter of due process or by statutory provision. Appellants cite no cases in which claimants to statutory entitlements similar to V.A. benefits are precluded from being represented by retained counsel; this harsh rule for V.A. claimants is truly an anomaly.

Claimants' interests in obtaining a fair hearing and being allowed to consult attorneys on their legal rights clearly outweigh the relatively weak interests of the government in

maintaining the fee limit, especially when it is of such questionable value in achieving any of the asserted statutory purposes. Appellants misleadingly suggest that removal of the fee limit would somehow subvert the Congressional intent that the V.A. operate in an informal and nonadversarial manner. This simply is not true. Appellees do not challenge the procedures established by Congress for V.A. claims adjudication and do not seek to disrupt the informality of that system. They seek only the assistance of counsel in complying with those procedures so that they might have a meaningful opportunity to present their claims.

This Court also should affirm the district court's order on First Amendment grounds. A claim for SCDD benefits constitutes an exercise of the First Amendment right to petition the government for redress of grievances, and the $10 fee limit substantially impairs the ability of claimants to formulate those grievances. Such an infringement of the First Amendment is warranted only if it is substantially related to a compelling government interest and is narrowly drawn to avoid unnecessary encroachment. That test is not met in this case.

ARGUMENT

I. THE $10 FEE LIMIT EFFECTIVELY PRECLUDES SCDD CLAIMANTS FROM CONSULTING ATTORNEYS IN DEVELOPING AND PRESENTING THEIR V.A. CLAIMS AND THEREBY DEPRIVES THEM OF PROCEDURAL DUE PROCESS.

A. SCDD applicants, like recipients, have a property interest in the expected receipt of compensation.

That recipients of SCDD compensation have a property interest in continued receipt of such benefits cannot seriously be disputed. Recipients of welfare and social security benefits have a property interest in those entitlements, *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970); *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976), as do recipients of V.A. educational benefits and pensions, *Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980); *Plato v. Roudebush*, 397 F. Supp. 1295, 1308 (D. Md. 1975). Any recipient of governmental benefits has a property

interest in such payments, so long as the expectation of continued receipt is grounded in the statute establishing the entitlement. Indeed, Appellants seem to concede that SCDD recipients have a property interest in such compensation. Appellants' Brief at 46 n.49.

However, it is especially important that the property interests of initial applicants also be recognized, for it is in the application stage that complex claims are most often denied and procedural protections, including legal representation, are most needed to assure a fair adjudication. This Court has not squarely decided whether applicants for statutory benefits have a property interest entitling them to due process. However, its recognition of the due process rights of applicants in government licensing and regulation cases leads inevitably to the conclusion that applicants for statutory entitlements must also be accorded due process.[4]

Many lower Federal courts have specifically held, in the context of other benefit distribution schemes, that due process does apply in the application stage, for it is the statutory creation of an entitlement, and not the actual receipt of benefits, that establishes the property interest. Thus, where the qualifications for entitlement are objectively defined by statute and the dispensation of benefits is not discretionary, applicants, like recipients, have a property interest sufficient to invoke due process protections.

The Ninth Circuit has unequivocally adopted this rule. *Griffeth* v. *Detrich*, 603 F.2d 118, 120-22 (9th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980) (unsuccessful applicant for general relief had a property interest sufficient to allow a due process

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[4] *See, e.g., Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 11-12 (1979) (applicants for parole); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957) (applicant for admission to practice law); *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926) (applicant to practice before Board of Tax Appeals). *Cf. Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428-33 (1982) (claimant under Illinois Fair Employment Practices Act).

challenge to the procedures used in denying the application).[5] Other circuits have also held that initial applicants under a statutory entitlement scheme are entitled to due process,[6] and many district courts are in accord.[7]

The SCDD entitlement provisions clearly fall within these principles. Objective entitlement criteria are set forth in 38 U.S.C. §§ 301-423 and in Title 38 of the Code of Federal Regulations. Payments are not discretionary. *See* 38 U.S.C. §§ 310, 321, 331, 341 (using the mandatory language, "the United States will pay," or the survivors "shall be entitled"). Moreover, applicants for such compensation have a greater property interest than applicants for many other public benefits because SCDD compensation is, in a very real sense, "earned" by the military service and service-connected injuries that are prerequisites of entitlement.

Appellants do not press the distinction between applicants and recipients as a basis for deciding this case, and the Court should draw no such distinction. The Federal District Court for the Central District of California once held that applicants for SCDD compensation have no property interest in the receipt of such benefits, and this Court summarily affirmed that decision. *Gendron* v. *Saxbe*, 389 F. Supp. 1303 (C.D.Cal.), *aff'd mem. sub nom. Gendron* v. *Levi*, 423 U.S. 802 (1975).[8] It is unclear, however, whether the applicant-recipient distinction was the basis for the summary affirmance. Moreover, that case involved a purely facial challenge to the fee limitation, and was decided without the careful inquiry into the actual operation of the V.A. adjudication system that was made by the district court in this case (*see* J.S.App. 26a-38a). The record developed in the instant case demonstrates the falsity of *Gendron*'s assumptions about the "nonadversarial" operation of the V.A. system and the adequacy of representation by service organizations.

Summary affirmances, while binding on the lower courts, have only limited stare decisis effect when the same issues are presented for full consideration by this Court, particularly where constitutional issues are implicated. *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974). This Court has never before given plenary consideration to the constitutionality of these fee provisions in the face of procedural due process and First Amendment challenges such as those raised in this case. In considering the issues now presented, this Court should not give undue consideration to its summary affirmance of *Gendron*.[9]

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[5] *See also Ressler* v. *Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for Section 8 rent subsidies are entitled to due process under *Griffeth* rationale, and also "by virtue of [their] membership in a class of individuals whom the Section 8 program was intended to benefit." *Id.* at 1215). *Cf. Geneva Towers Tenants Organization* v. *Federated Mortgage Investors*, 504 F.2d 483 (9th Cir. 1974).

[6] *Daniels* v. *Woodbury County, Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984) (applicant for state general assistance); *Kelly* v. *Railway Retirement Board*, 625 F.2d 486, 489-90 (3d Cir. 1980) (applicant for disabled child's annuity under Railway Retirement Act). *Accord Wright* v. *Califano*, 587 F.2d 345, 354 (7th Cir. 1978) (applicants initially denied social security benefits).

[7] *Davis* v. *United States*, 415 F. Supp. 1086, 1090-92, 1095-96 (D. Kan. 1976) (applicant for compensation for injuries incurred while engaged in prison employment); *Shaw* v. *Weinberger*, 395 F. Supp. 268, 270-71 (W.D.N.C. 1975) (applicant for Supplemental Security Income); *Alexander* v. *Silverman*, 356 F. Supp. 1179, 1179-80 (E.D. Wisc. 1973) (applicants for general relief); *Barnett* v. *Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (welfare applicant); *Davis* v. *Toledo Metropolitan Housing Authority*, 311 F. Supp. 795, 796-97 (N.D. Ohio 1970) (applicant for public housing).

[8] The applicant-recipient distinction drawn in *Gendron* is derived primarily from two statements in *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972): first, that in order to have a property interest in an entitlement, a claimant must have more than a "unilateral expectation" of its receipt, and second, that there is a property interest in "legitimate" claims of entitlement. However, it seems clear that those statements were intended to distinguish between claims of entitlement resting upon some objectively identifiable basis, such as a statute, contract or "existing rules or understandings," *see, e.g., Perry* v. *Sindermann*, 408 U.S. 593, 599-603 (1972), and those based upon a claimant's purely subjective belief that he should be entitled to a particular substantive right. The quoted passages were *not* intended to distinguish between "legitimate" and "illegitimate" claims in the sense that only favorably adjudicated claims could be considered "legitimate"; adoption of that view would require an assumption that all claims adjudication processes are 100% accurate, efficient and fair, which is simply untenable. *Cf. Goss* v. *Lopez*, 419 U.S. 565, 579-80 (1975).

[9] The Court should likewise disregard *Demarest* v. *United States*, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 2150 (1984), which simply followed what the Ninth Circuit regarded as the mandate of *Gendron*. The other lower court cases cited in Appellants' Brief at 18 n.17 rested on earlier Supreme Court authority which decided constitutional issues or issues of statutory construction other than the procedural due process and First Amendment

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B. The freedom to retain counsel is an important element of procedural due process in V.A. adjudications.

Appellees do not ask that the government appoint counsel for them; they ask only that they be allowed to spend their own money to hire attorneys to assist them in the V.A. claims process. Under the Due Process Clause, they are entitled to no less.

Before an individual may be finally deprived of a property or liberty interest, he is entitled to notice and an opportunity to be heard. *E.g., Mathews* v. *Eldridge,* 424 U.S. at 333; *Wolff* v. *McDonnell,* 418 U.S. 539, 557-58 (1974); *Fuentes* v. *Shevin,* 407 U.S. 67, 82 (1972). Moreover, the necessary hearing must be provided "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). The specific requirements of due process are flexible, but in all cases the procedures must be fair and must befit the circumstances of the actual or potential deprivation. *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972).

In V.A. proceedings, this means that claimants must have the right to retain counsel. As Appellees have demonstrated, and as

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challenges raised in this case. The Supreme Court cases cited by Appellants are briefly described as follows: *Hines* v. *Lowrey,* 305 U.S. 85, 87, 90-91 (1938) ($10 fee limit deprived state courts of jurisdiction to award higher fees for services rendered on behalf of an incompetent); *Margolin* v. *United States,* 269 U.S. 93, 95-96, 101-02 (1925) (fee limit upheld against substantive due process challenge by attorney); *Nelson* v. *Dysart,* 267 U.S. 540 (1925) (state workers' compensation statute limiting legal fees to amount set by court upheld against substantive due process challenge by attorney); *Calhoun* v. *Massie,* 253 U.S. 170, 173-75 (1920) (20% limit on legal fees payable under a special congressional appropriation for compensation of Civil War claims upheld against substantive due process challenge by attorney); *Newman* v. *Moyers,* 253 U.S. 182, 183, 185 (1920) (same); *Capital Trust Co.* v. *Calhoun,* 250 U.S. 208, 216-20 (1919) (20% limit on fees payable under special congressional appropriation upheld against substantive due process challenge by attorney, insofar as the excess fee was to be satisfied out of the money paid under the appropriation); *Frisbie* v. *United States,* 157 U.S. 160, 165-66 (1895) (predecessor of $10 fee limit upheld against substantive due process challenge by attorney); *United States* v. *Hall, 98* U.S. 343, 349-58 (1878) (upholding constitutionality of Federal criminal statute prohibiting guardian from embezzling the military pension funds of his ward). None of these cases is even remotely dispositive of the issues now before the Court.

the district court found, "both the procedures and the substance entailed in presenting SCDD claims . . . are extremely complex" (J.S.App. 30a). V.A. claims processing is governed by an array of published and unpublished sources, including statutes, regulations, procedural manuals, circulars, guides and precedential decisions, the interrelation of which is so complicated that one regional office has sought authorization to purchase a computer to cross-reference them (J.S.App. 30a, J.A. 394). Claimants are permitted to introduce documentary, testimonial or other evidence, 38 C.F.R. § 3.103(b) (1984), and in fact must submit "evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." 38 C.F.R. § 3.102 (1984). Inaction can result in a final disallowance of the claim, with no right of appeal, as when the V.A. requests additional evidence and the claimant fails to respond within a year (J.S.App. 30a-31a). In such cases, all accrued or retroactive benefits are forfeited, even if the claim is later reopened (J.S.App. 31a). Claimants must meet deadlines for filing either a notice of disagreement or an appeal, depending upon the stage of the adjudication (J.S.App. 28a-29a). The substantive appeal must state all disputed issues of fact or law, 38 C.F.R. § 19.123(a) (1984); the claimant is "presumed to be in agreement with any statement of fact . . . to which no exception is taken." 38 C.F.R. § 19.121(b)(3) (1984).

A number of statutory presumptions apply to SCDD claims, depending upon the period and conditions of service, the nature of the disability and the date of onset. *See, e.g.,* 38 U.S.C. §§ 311-313, 333, 337, 353, 354. These presumptions are intended to protect claimants, but their language is confusing to a layman, and without advice as to their meaning, the intended protections may well be unavailing.[10]

[10] For instance, under 38 U.S.C. § 312 there is a presumption of service-connection for any chronic disease which manifests itself within one year after separation, despite lack of evidence of the disease during the service period. However, the V.A. frequently misapplies this presumption by denying benefits if the condition did not manifest itself within the one-year presumptive period. This kind of legal error will almost never be apparent to a claimant untrained in the law.

The claims themselves involve proof of medical disability, causation and degree of impairment, which are traditional tort issues on which attorneys can offer substantial assistance. Particularly in complex cases, SCDD claims require the acquisition, organization and presentation of sophisticated scientific and medical evidence, expert opinions and statistical data. Professional legal assistance is necessary to help claimants comply with procedural intricacies, identify witnesses with relevant information, secure and interpret documentary evidence, prevent or discover procedural or substantive errors by the V.A., present evidence at personal hearings, and delineate the legal and factual issues for adjudication or appeal.[11]

A 1983 V.A. study shows that 2,067 claims were filed for death or disability resulting from the testing of nuclear weapons; all but 14 were denied (J.A. 515). An additional 388 claims were filed based on exposure to radiation in Nagasaki or Hiroshima; all of those claims were denied (J.A. 515). Unless this Court accepts as accurate the V.A.'s determination that virtually no U.S. military personnel have been harmed by the testing or use of nuclear weapons, then something is seriously wrong with the V.A. claims adjudication process. Whether the process is denominated "adversarial" or "nonadversarial," the fact is that

[11] In fact, Appellants admit that attorneys would be of assistance to V.A. claimants in some cases, Government's motion to affirm *Gendron* at 7 n.9, but argue that due process rules are not designed to accommodate "the rare exceptions." Appellants' Brief at 36 (citing *Mathews* v. *Eldridge*, 424 U.S. at 344). There have been almost 19,000 atomic veteran and Agent Orange claims alone (J.A. 509, 515), many more thousand PTSD claims, and many other claims incapable of precise categorization in which attorneys could offer crucial assistance. We do not believe that *Mathews* v. *Eldridge* intended to sanction the kind of grievous sacrifices here imposed on thousands of American veterans, even assuming arguendo that a simple body count might show them to be a minority of the total number of claimants. The Due Process Clause is intended to protect the rights of *individuals* against arbitrary action by the state; the interests of these thousands of individuals cannot simply be deemed "rare exceptions" and disregarded. "[T]he right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." *Boddie* v. *Connecticut*, 401 U.S. 371, 379-80 (1971).

it results in an inordinately high percentage of denials in complicated cases (J.A. 509, 515).[12] Applicants are unable to prove their claims to the satisfaction of the V.A., and they do not know why. As in Albert Maxwell's case, the "reason" for the denial of benefits is often a conclusory statement that the disability is not service-connected, and claimants have no recourse to effective assistance in establishing the disputed facts, whatever they might be, to convince the V.A. to the contrary. For this reason, it is especially important that applicants for SCDD compensation be allowed to hire attorneys so that they have a fair chance to establish their entitlement to benefits in the first instance.

Appellants argue that the present system provides V.A. claimants with a fair procedure, despite their acknowledgement that the $10 fee limitation has the effect of excluding the participation of attorneys in the process.[13] Appellants' Brief at 19, 26, 30-31; S. Rep. No. 97-466, 97th Cong., 2d Sess. 102 (1982). This is plainly wrong.

The practical value of attorney representation in a variety of adjudicative settings has often been recognized by this Court. *See, e.g., Goldberg* v. *Kelly*, 397 U.S. at 270-71 (holding the right to retained counsel to be an element of due process in welfare termination hearings because "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel" (quoting *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932)).

Seeking to dispose of this issue simply by dubbing the V.A. process "informal" and "nonadversarial" not only distorts the facts (*see* J.S. App. 33a-38a), but fundamentally misconceives the nature of the problem. Regardless of the degree of formality

[12] Appellants cite several isolated passages from *In re Agent Orange Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984), which tend to cast doubt on the strength of the plaintiffs' case on the issue of causation. That opinion did not contain findings of fact after a trial. It was written to justify the $180 million settlement in the face of opposition by the majority of plaintiffs who expressed their views at the Fairness Hearings. *See id.* at 759, 761-75. Naturally, in such a posture, the court would emphasize the risks of litigation for the plaintiffs.

[13] Only 2% of all V.A. claimants were represented by counsel in fiscal year 1983. *See* Appellants' Brief at 9 n.9.

of V.A. hearings, the burden of proof is on the applicant, 38 C.F.R. § 3.102 (1984), and if he fails to develop and present available evidence due to ignorance or incapacity, the proof fails, even in the absence of an "adversary."

The purportedly "informal" and "nonadversarial" nature of the proceeding does not eliminate the need for counsel. *See In re Gault*, 387 U.S. 1, 14-30, 34-42 (1967) (appointed counsel necessary in juvenile delinquency proceedings despite their nonadversarial nature). In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), for instance, this Court recognized the need for legal representation, even in the context of "informal" probation revocation proceedings because "the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires ... *the offering or dissecting of complex documentary evidence.*" *Id.* at 786-87 (emphasis added). This factor is even more compelling in V.A. adjudications because attorneys are needed not only to "offer and dissect" documentary evidence, such as medical records, statistical data and the opinions of experts, but also to appreciate its necessity in the first instance, determine from which sources it might be available, gather it, understand it and convince the factfinder of its probative value.

Nor does the fact that these adjudications relate to medical issues reduce the need for attorney representation.[14] In *Vitek* v. *Jones*, 445 U.S. 480, 495 (1980), this Court held that a prison inmate threatened with transfer to a mental hospital was entitled to a pre-transfer due process hearing, despite the "medical nature of the inquiry." Four members of the Court believed that due process also required appointment of counsel, *id.* at 496-97 (White, Brennan, Marshall and Stevens, JJ.), and a fifth believed it required appointment of "qualified and independent assistance," but not necessarily a lawyer, *id.* at 497-500 (Powell, J., concurring in part). In *Vitek*, a "licensed psychiatrist or mental health professional," *id.* at 500, might have been as capable as a lawyer in protecting the inmate's rights, for the medical decision there was largely predictive — whether the individual's mental condition required that he be institutionalized.[15] Claims for SCDD compensation, in contrast, turn on the proof of past and current facts — the existence of a disability, its service-connection, and the disability "rating." These issues, similar to those involved in other personal injury actions, are exactly the kind on which an attorney's assistance would be invaluable. And, too, in SCDD claims the physical or psychological disability itself contributes significantly to the need for legal assistance. *Cf. id.* at 496-97.

The availability of additional safeguards through alternative[16] or subsequent[17] proceedings is also a factor in determining the constitutional adequacy of a particular procedure. Such protections are nonexistent in this case. The fee limit applies at all stages of V.A. proceedings, and there is no right to judicial

[14] *Mathews* v. *Eldridge*, 424 U.S. at 343-44, distinguished the inquiry involved in social security disability claims from that involved in welfare claims by referring to the medical nature of disability claims, the predominance of documentary evidence and the relative lack of credibility and veracity as critical factors. This distinction was not drawn, however, to determine whether representation by counsel was necessary — social security disability claimants, unlike V.A. claimants, have a right to be represented by counsel, 20 C.F.R. §§ 404.950(a), 404.1705(a) (1984). Rather, the issue in *Eldridge* was whether an *oral* pretermination hearing would substantially reduce the risk of erroneous deprivation where a post-termination hearing was available. In that connection, the Court observed that in disability claims a written presentation would be more likely to suffice than in cases where credibility and veracity are more critical factors. *Id.* at 345. V.A. claimants have a right to oral hearings, so the *Eldridge* issue does not arise. Rather, the question in this case is whether attorneys could substantially assist applicants in investigating and preparing disability claims and in presenting medical evidence, whether in written form or through live testimony. Neither *Eldridge* nor the other cases cited by Appellants undercut the need for attorneys in such capacities.

[15] Even if a medical professional could adequately "represent" a V.A. claimant, the $10 fee limitation would prevent the veteran from securing such representation.

[16] *See Middendorf* v. *Henry*, 425 U.S. 25, 46-48 (1976) (counsel need not be appointed in summary court-martial proceedings in part due to the unique ability of the accused to refuse such proceedings and instead to accept a special or general court-martial, which would carry with it the right to retained or appointed counsel). *Cf. Boddie* v. *Connecticut*, 401 U.S. at 374-77 (absence of alternative forum to effect divorce supports conclusion that the state court filing fee, which precluded indigents, violated due process).

[17] *See Mathews* v. *Eldridge*, 424 U.S. at 349 (availability of post-termination hearings and judicial review prior to final deprivation of social security disability benefits heavily influenced the decision that pretermination hearings need not be provided).

review. 38 U.S.C. § 211(a). And because veterans cannot sue for disabilities stemming from their military service under the Federal Tort Claims Act, *Feres* v. *United States,* 340 U.S. 135 (1950), it is essential that they be given a fair hearing before the V.A.

It may be true that the V.A. does not hire attorneys specifically to act as "adversaries" to claimants,[18] but neither do other agencies charged with the distribution of statutory entitlements. Yet, the right to retained counsel has been held to be an element of procedural due process in claims adjudications before a wide variety of such agencies[19] and in other purportedly "nonadversarial" hearings.[20] Moreover, even where not judicially determined to be an element of due process, the right to retained

[18] However, many V.A. staff members are, in fact, attorneys, *see* Appellees' Brief at 7, and the district court found that V.A. claimants perceive the process as adversarial (J.S. App. 35a; *see also* J.A. 122-125, 149, 159, 180, 182, 187-189, 192-194, 200, 217).

[19] *E.g., Goldberg* v. *Kelly,* 397 U.S. at 270 (termination of public assistance payments); *Ressler* v. *Pierce,* 692 F.2d at 1219-20 (applications for Section 8 subsidized housing); *Caulder* v. *Durham Housing Authority,* 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied,* 401 U.S. 1003 (1971) (termination of lease in Federally assisted public housing project); *Ferguson* v. *Metropolitan Development & Housing Agency,* 485 F. Supp. 517, 522, 528 (M.D. Tenn. 1980) (termination of Section 8 housing subsidies); *Davis* v. *United States,* 415 F. Supp. at 1098 (claim for injuries resulting from employment with Federal prison); *Barnett* v. *Lindsay,* 319 F. Supp. at 611-12 (all hearings on welfare benefits, including initial denials).

[20] *E.g., In re Gault,* 387 U.S. at 34-42 (commitment proceedings for juvenile delinquents); *Specht* v. *Patterson,* 386 U.S. 605, 610 (1967) (sex offender commitment following criminal conviction); *Indiana Planned Parenthood* v. *Pearson,* 716 F.2d 1127, 1138 (7th Cir. 1983) (appointed counsel necessary for minor's petition to bypass parental notification of abortion); *Black Coalition* v. *Portland School Dist. No. 1,* 484 F.2d 1040, 1045 (9th Cir. 1973) (expulsion from school); *Crook* v. *Baker,* 584 F. Supp. 1531, 1556, 1559-60 (E.D. Mich. 1984) (proceeding to rescind college degree); *Feinberg* v. *Federal Deposit Insurance Corp.,* 420 F. Supp. 109, 120 (D.D.C. 1976) (FDIC proceeding to suspend bank officer from duties); *Batchelder* v. *Kenton,* 383 F. Supp. 299, 302 (C.D. Cal. 1974) (inmate's parole date revocation); *Givens* v. *Poe,* 346 F. Supp. 202, 209 (W.D.N.C. 1972) (dismissal of students from public school).

counsel is uniformly provided for by statute or regulation in administrative proceedings similar to V.A. proceedings.[21]

Indeed, Appellants cite no cases which hold that retained counsel may not participate in claims adjudications comparable to the V.A. system. Instead, they rely on cases dealing with appointment of counsel for indigents in various noncriminal contexts, *see* Appellees' Brief at 27-28 n.18, a considerably different issue. Indeed, most of the "appointed counsel" cases cited by Appellants either implicitly or explicitly recognized the right to retained counsel, which is all that Appellees seek in this case. The only cases cited by Appellants that considered the issue held only that retained counsel need not be allowed in prison disciplinary hearings, *Baxter* v. *Palmigiano,* 425 U.S. 308, 315 (1976) (but inmates could consult with counsel outside the hearing room, *see id.* at 312); *Wolff v. McDonnell,* 418 U.S. at 570, or in procedures imposing high school suspensions of ten days or less, *Goss* v. *Lopez,* 419 U.S. at 583 (recognizing also that longer suspensions might require greater protections, and that even in "difficult" short suspensions, counsel should be allowed as a matter of discretion, *id.* at 584). Obvious factual differences make those cases completely unpersuasive.

Aside from the necessity of counsel, there is also an important liberty interest at stake: the right of an individual to consult with attorneys on matters affecting his legal rights. *See, e.g., Powell* v. *Alabama,* 287 U.S. at 60, 68-69; *Potashnick* v. *Port City Construction Co.,* 609 F. 2d 1101, 1117-19 (5th Cir.), *cert. denied,* 449 U.S. 820 (1980). The infringement of this right through the $10 fee limitation is a serious intrusion on the liberty and privacy of the individual in deciding when legal counsel is necessary for the explanation or protection of his rights, how much he should pay for such services, and upon which matters he may receive legal counseling. These are issues traditionally left to the discretion of the individual without governmental interference. They are a matter of long tradition

[21] *See, e.g.,* 5 U.S.C. § 555(b) (Administrative Procedure Act); 20 C.F.R. §§ 404.950(a), 404.1705(a) (1984) (SSA hearings); *cf.* 8 U.S.C. § 1362 (deportation hearings); 10 U.S.C. § 1553(c) (military discharge review hearings); 18 U.S.C. § 4208(2) (parole determination hearings); 5 C.F.R. § 771.302(c)(2) (1984) (Federal employment grievance hearings).

and deeply held values which may not be discarded without strong justification. This liberty interest is entitled to great weight in the assessment of the right to retained counsel in V.A. proceedings.

C. Assistance from V.A. personnel and service organizations cannot substitute for professional legal assistance.

Appellants make much of the fact that free lay representation is available through veterans' service organizations and argue that this, coupled with the assistance supposedly provided by V.A. personnel, obviates the need for legal representation. However, as the district court found, V.A. personnel do not live up to their statutory obligation to assist claimants in developing the facts pertinent to their claims,[22] 38 C.F.R. § 3.103(a), and service organization representation is inadequate, given the complexity of V.A. procedures and the difficult factual showings that many claimants must make.

Service organization representatives work under "crushing" caseloads; at the national level, each has "about 5 cases to present per working day" (J.A. 547). Under these circumstances, as the district court found, the service representatives

[22] In fact, the V.A. rarely goes beyond the claimant's service history and military medical records in "developing the facts" (*see, e.g.*, J.A. 158-159); it does not seek corroborating evidence, experts' reports or independent medical opinions (J.S.App. 34a). Instead, claims examiners "are allocated a mere 2.84 hours in which to develop the facts underlying an initial SCDD claim," and "their performance is measured in part by the speed with which they process claims" (J.S.App. 33a). An internal V.A. memo shows that it is V.A. policy to encourage claimants to waive their right to a personal hearing (J.A. 512, 248-249; *see also* J.A. 91, 93). And, though the V.A. rarely exercises its subpoena power to help support claims, it has occasionally subpoenaed documents to try to refute them (J.S.App. 35a). Furthermore, in the case of atomic veterans, the V.A. has failed to document patterns of exposure or disease by cross-referencing claims files and has never requested an expert opinion (J.S.App. 34a). Congress itself has found that the V.A. "has not promulgated permanent regulations setting forth specific guidelines, standards and criteria for the adjudication of claims ... based on exposure ... to ionizing radiation." Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984). Indeed, in light of its dual role as guardian of the government purse and benefactor of the veteran, *see* 38 C.F.R. § 3.103(a) (1984), it is questionable whether the V.A. can ever purport to represent adequately the interests of individual claimants.

rarely gather documentary evidence or seek expert opinions on behalf of their clients (J.S.App. 36a). In almost all cases, the record consists of the claimant's service history and his service medical history (J.S.App. 36a). At hearings before the local rating panels, these representatives commonly rely on the board members to ask questions of their clients, rather than eliciting the testimony themselves (J.S.App. 37a; J.A. 432). Service organization representatives often waive their clients' rights to a personal hearing, submitting instead an "informal hearing memorandum," which is usually two pages or less in length (J.S.App. 37a). In that case, the claimant never meets his representative. Even when personal hearings are not waived, the representative usually meets his client for the first time about half an hour before the hearing (J.S.App. 37a).

The district court found that even in presenting final administrative appeals it is "standard practice" for service organization representatives to submit nothing more than a one- or two-page handwritten "brief," which rarely cites legal authority, and is often written by the claimant rather than by the representative (J.S.App. 36a-37a). "Almost none" of the service representatives are lawyers (J.S.App. 36a); consequently, they seldom raise legal issues on appeal (J.A. 365). This often results in waiver of legal errors not raised (J.A. 344).

The district court found that "neither the V.A. officials themselves nor the service organizations are providing the full array of services that paid attorneys might make available to claimants" (J.S.App. 33a). That finding cannot be overturned unless this Court concludes that it was clearly erroneous. Given the record in this case, such a conclusion is impossible.[23]

[23] The experiences of the individual plaintiffs in this case exemplify the ineffectiveness of representation by service organizations. Don Cordray, now deceased, was represented by the Veterans of Foreign Wars ("VFW") in an appeal from the denial of SCDD benefits for oat cell carcinoma and related ailments that he believed were caused by his exposure to radiation during Operation Crossroads. The written statement of the VFW representative in

(footnote continued on next page)

D. The interests of V.A. claimants in a fair presentation of their claims and access to legal advice far outweigh the asserted governmental interests.

In assessing the fairness of a given procedure, the Court must balance the individual interests at stake against the interests of the government in maintaining the established procedure, in light of the risk of erroneous deprivation of the individual's interests and the probable value of the proposed additional safeguards in reducing that risk. *Mathews* v. *Eldridge*, 424 U.S. at 335.

The private interests of V.A. claimants are to obtain a fair adjudication of their claims and to maintain the freedom to consult attorneys concerning their legal rights. With respect to the interest of V.A. claimants in securing a fair claims procedure, the risk of erroneous deprivation resulting from the

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(footnote continued from previous page)
support of Cordray's final administrative appeal read, in its entirety, as follows:

> "The veteran appeals for service connection for sciatic nerve damage which he contends was caused by injections after contamination by Atomic fallout.
>
> "He believes his arthritis is of many years standing and had its inception during service.
>
> "The third part of the appeal is for an increased evaluation of his Duodenal ulcer" (J.A. 44).

This statement apparently resulted in a hearing in which Cordray was "represented" by the VFW. Cordray did not attend this hearing, however, and, in fact, never received notice that it had been scheduled for him (J.A. 148).

Similarly, Albert Maxwell's representative from the Disabled American Veterans ("DAV") did nothing to help him develop the facts to support his disability claim (J.A. 310-312, 314). Without Maxwell's authorization, the representative later cancelled a personal hearing that had been scheduled for Maxwell and did not even notify him that the hearing had been cancelled (J.A. 83, 86). Maxwell did not find out about the cancellation, and assumed that his claim was still pending, until he contacted the DAV to check on the status of his claim and was told that his representative had retired and was no longer handling the case (J.A. 309-310). Another DAV representative unilaterally decided not to raise claims for certain of Maxwell's disabilities, without obtaining Maxwell's consent to waive those claims and without informing him of any reason for not raising them (J.A. 321-322). *See also* J.A. 122, 127, 131-138, 143-144, 149, 180, 182, 188, 197-199, 217.

current ban on legal representation, because unquantifiable,[24] must be assessed by examining the "probable value . . . of substitute procedural safe[illegible]" *id.*, which was discussed in the preceding section of [illegible]. However, a claimant's separate interest in having essentia[illegible]tered access to legal counsel is a liberty interest which has [illegible]tial weight of its own and must be weighed in the balance [illegible]rom any objective proof of the efficacy of the attorney's servi[illegible].

The gravity of the loss to which the claimant is subjected is also entitled to weight in the balance, *see Goss* v. *Lopez*, 419 U.S. at 575-76; *Board of Regents* v. *Roth*, 408 U.S. at 570-71 & n.8; *Goldberg* v. *Kelly*, 397 U.S. at 262-64, and here that loss is severe. SCDD compensation, linked as it is to the disability or death of an individual who traditionally has been the family's breadwinner, often provides for the bare necessities of life. *See* Appellees' Brief at 25.

These important individual interests clearly outweigh the government's asserted interest in the preservation of the fee limitation. The district court found that the government had "asserted little or no cognizable interest in maintaining the $10.00 fee restriction" (J.S.App. 39a). That finding is fully supported by an analysis of the statutory justifications advanced by Appellants.

According to Appellants, the fee limitation serves a governmental interest by helping to preserve the "nonadversarial" nature of V.A. claims processing. Of course, the right to retained counsel as an element of due process does not turn on a formulaic distinction between "adversarial" and "nonadversarial" proceedings. *See* pp. 16-19, *supra*. Moreover, the V.A. claims

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[24] The risk of erroneous deprivation is difficult either to document or to refute on the basis of statistics alone. Approximately 26.5% of all V.A. administrative appeals result in reversal or remand (J.A. 584), which is certainly a significant error rate. But, as the district court found, statistics reflecting the success rate of claimants currently represented by attorneys are not very probative (J.S. App. 27a) because the number of such cases is statistically insignificant and because the attorneys currently representing V.A. claimants do so under the strictures of the fee limitation. This Court, too, has expressed dissatisfaction with mere statistics in reflecting the risk of erroneous deprivation. *See Mathews* v. *Eldridge*, 424 U.S. at 346.

adjudication process, as found by the district court (J.S.App. 33a-36a), is hardly "nonadversarial." *See* notes 18 & 22, *supra*.

But more importantly, Appellants erroneously assume that removal of the $10 fee limit would somehow disrupt the statutory scheme for processing V.A. claims. This fear is unfounded. Appellees challenge none of the V.A.'s procedural rules other than the fee limitation. No veteran would be required to hire an attorney, nor would the government be compelled to appear in a more adversarial role. Assistance from service organizations would continue as an option in any case in which the claimant prefers such lay representation. Moreover, the other statutory provisions regarding the informality of proceedings would remain intact. Finally, and significantly, participation by attorneys, where the claimant desires such assistance, would help to assure that the V.A. complies with its own regulations.

The other asserted justifications for the fee limitation do not tip the balance in favor of its retention. Appellants, understandably, have all but abandoned reference to the governmental interest traditionally advanced to justify the fee limit — concern for the welfare of veterans. There is no reason to believe that veterans are in greater need of protection from "overreaching and sharp practices" than are recipients of other statutory benefits or the public generally. And while an interest in the welfare of veterans may have motivated the statute's original enactment, radically changed circumstances since its inception actually make the fee limit antithetical to that goal.

Appellants also suggest that the statute is necessary to ensure that the V.A. benefits paid "inure solely to the benefit of the [veteran]." Appellants' Brief at 31. The bitter irony of that statement cannot escape a veteran whose claim is denied due to his inability to develop and present it effectively. In the absence of the fee limit, any claimant concerned about the cost of legal assistance could, and predictably would, seek the free assistance of a service organization representative, at least during the initial application stages. If the claim is initially denied, however, the applicant might well conclude that professional legal assistance is necessary on appeal, and he should be free to make that decision.

As for the need to protect the Treasury from fraud, only the most cynical assumptions would support the view that removal of the fee limit would somehow entice attorneys to bring fraudulent claims on behalf of veterans. In any event, such practices are sufficiently deterred by ethical rules and criminal penalties currently in place.

Appellants raise for the first time on appeal the potential for increased administrative costs. Appellants' Brief at 30 n.29. However, that argument is disingenuous, for the legislative analysis estimated no increase in administrative costs as a result of repealing the fee limit. S. Rep. No. 98-130, 98th Cong., 1st Sess. 50 (1983). Increased costs, if a factor at all, are not of "controlling weight," *Mathews* v. *Eldridge*, 424 U.S. at 348, and cannot outweigh the individual interests at stake here. *See Goldberg* v. *Kelly*, 397 U.S. at 265-66. For while it is true that the V.A. is charged with processing a large number of claims quickly and efficiently, Appellants' Brief at 27, "the Constitution recognizes higher values than speed and efficiency." *Fuentes* v. *Shevin*, 407 U.S. at 90 n.22 (quoting *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972)). The Due Process Clause was designed specifically to protect individuals from the excess of "efficiency" that is often the hallmark of an unfair proceeding. *Id.*

II. THE $10 FEE LIMIT IMPERMISSIBLY INFRINGES CLAIMANTS' FIRST AMENDMENT RIGHTS OF PETITION AND ACCESS TO JUSTICE.

A. An application for SCDD benefits constitutes an exercise of the right of petition, and the fee limit impairs the exercise of that right and the right of access to justice.

The First Amendment right to petition the government for redress of grievances extends to the courts and administrative agencies, as well as the legislature. *E.g., California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972). Where, as here, the grievance is one of disability or death stemming from military service on behalf of the nation, an application for compensation filed with a Federal agency vested with the sole power to redress such injuries is quintessentially a "petition" for "redress of grievances." The petition of a "soldier of the Revolution" was specifically cited in early House debates as a prototypic exercise of the right of petition. Speech of John

Quincy Adams Upon the Right of the People to Petition (1838), *reprinted in The Anti-Slavery Crusade in America* 23 (J. McPherson & W. Katz eds. 1969). This reasoning applies with even greater force in the case of atomic veteran and Agent Orange claims, where the injury is not one stemming simply from the circumstances of wartime service in general, or from an injury inflicted by the enemy, but rather from a specific policy decision on the part of the United States to employ a particular type of weapon or chemical agent.[25]

The related right of access to the courts is now recognized as one aspect of the First Amendment right of petition.[26] Thus, in *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. at 510, this Court held that highway carriers applying to administrative agencies for the acquisition of operating rights, as well as those opposing such applications, have a constitutional right of access to such agencies grounded in the right of petition. In this sense, the "right of access" is really a right of access to justice, not merely to the courts. Since veterans and their survivors are foreclosed from seeking redress through the courts under the *Feres* doctrine, their right of access to the V.A. as an adjudicative forum must be accorded the same protection as is the right of access to the courts in other contexts.

[25] NAAV is not an anti-nuclear organization. It simply believes that the government must compensate its citizens for injuries incurred as a result of its decision to test and use nuclear weapons, and it must give them a fair opportunity to prove those injuries.

[26] *See, e.g., Hudson* v. *Palmer,* 104 S.Ct. 3194, 3198 (1984) ("Like others, prisoners have the constitutional right to petition the Government for redress of their grievances which includes a reasonable right of access to the courts."); *Cruz* v. *Beto,* 405 U.S. 319, 321 (1972) (per curiam); *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. at 510 ("The right of access to the courts is indeed but one aspect of the right of petition."); *Milhouse* v. *Carlson,* 652 F.2d 371, 373-74 (3d Cir. 1981); *Wilson* v. *Thompson,* 593 F.2d 1375, 1387 (5th Cir. 1979); *Pizzolato* v. *Perez,* 524 F. Supp. 914, 921 (E.D. La. 1981). *Cf. United Mine Workers* v. *Illinois State Bar Ass'n,* 389 U.S. 217, 221-23 (1967) (right of petition is among the rights invaded when collective action to assert legal rights of association's members through litigation or administrative adjudication is prohibited); *accord In re Primus,* 436 U.S. 412, 426 (1978); *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576, 585-86 (1971); *Brotherhood of Railroad Trainmen* v. *Virginia State Bar,* 377 U.S. 1, 5-6 (1964); *NAACP* v. *Button,* 371 U.S. 415, 428-31 (1963).

A statute infringes the right of access to justice, and hence the right of petition, if it erects impediments, either on its face or as applied, to the effective formulation of the grievance. Hence, absent a reasonable alternative, prison officials cannot deprive inmates of the legal advice available to them through "jailhouse lawyers," *Johnson* v. *Avery,* 393 U.S. 483, 490 (1969), and thus impair their ability to prepare habeas corpus petitions, or even civil rights actions, *Wolff* v. *McDonnell,* 418 U.S. at 577-80.[27] This Court and others have gone even further by requiring state expenditure to furnish inmates with "adequate law libraries or adequate assistance from persons trained in the law." *Bounds* v. *Smith,* 430 U.S. 817, 828 (1977); *Gilmore* v. *Lynch,* 319 F. Supp. 105, 110-11 (N.D. Cal. 1970) (three-judge court), *aff'd per curiam sub nom. Younger* v. *Gilmore,* 404 U.S. 15 (1971).

The import of these decisions is that the right of access to the courts requires more than physical access; there is no suggestion in *Avery, Bounds or Wolff* that the prisoners were, in fact, prevented from filing habeas petitions or civil rights actions. But physical access was not enough to satisfy the constitutional guarantee; the inmates had to be provided with the means to make such access "meaningful." *Bounds* v. *Smith,* 430 U.S. at 822 (right of access must be "adequate, effective, and meaningful"). The concept of "meaningful access" goes to the ability of the petitioner to formulate his grievance in such a way that it will be susceptible of receiving meaningful consideration by the adjudicator. *See id.* at 828 (inmates must be given assistance in preparing "meaningful legal papers"); *Gilmore* v. *Lynch,* 319 F. Supp. at 110 (" 'Access to courts' ... encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him").

In the prison context, due to the state's physical incarceration of inmates and the liberty and constitutional issues at stake in

[27] *Wolff* v. *McDonnell,* 418 U.S. at 579, and certain other cases, *e.g., Boddie* v. *Connecticut,* 401 U.S. at 382, found the right of access grounded in the Due Process Clause. There is no evident consistency in the cases as to the constitutional basis of the right. It may, in fact, derive from both the First and Fifth Amendments. But where, as here, the petitioning parties seek not only access to the procedural mechanisms provided by the government, but substantive redress as well, the First Amendment is clearly implicated.

their petitions, this concept required state expenditure to assist in the meaningful exercise of the right. But the rights of access and petition are not limited to the prison context or to the vindication of constitutional rights. *See, e.g., California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508; *Boddie* v. *Connecticut,* 401 U.S. 371; *Ryland* v. *Shapiro,* 708 F.2d 967, 971-75 (5th Cir. 1983). The rationale underlying the right of access cases dictates that the government may not, without strong justification, restrict an individual's access to justice by depriving him of the means necessary to make such access meaningful, including the ability effectively to formulate his grievance.

Even aside from the question of access to justice, the government may not impose unnecessary impediments on the effective exercise of the right of petition. *E.g., Clean-up '84* v. *Heinrich,* 582 F. Supp. 125,126 (M.D. Fla. 1984) (preliminary injunction granted against statute prohibiting election-day circulation of petitions near polling places); *Moffett* v. *Killian,* 360 F. Supp. 228, 231-32 (D. Conn. 1973) (three-judge court) (registration fee for lobbyists in excess of amount required to administer disclosure requirements of statute was an unconstitutional "tax" on the right of petition); *Jeanette Rankin Brigade* v. *Chief of Capitol Police,* 342 F. Supp. 575, 585 (D.D.C.) (three-judge court), *aff'd mem.,* 409 U.S. 972 (1972) (prohibition against assemblies on capitol grounds violates, *inter alia,* right of petition).

Arbitrary spending limits which hinder an individual in asserting the right of petition also run directly counter to the rationale of *Buckley* v. *Valeo,* 424 U.S. 1, 39-59 (1976), where this Court struck down dollar limitations on personal expenditures for political campaigns due to their "substantial and direct restrictions" on the ability of individuals to exercise their First Amendment rights. *Id.* at 58-59. So, too, where a private citizen desires to use his own money in pursuance of the First Amendment right of petition, the government's interference by placing a ceiling on the amount he may spend, especially where the ceiling is so low that it effectively precludes him from securing the assistance he needs, runs afoul of the First Amendment.

For veterans, the $10 fee limitation creates a barrier to the effective preparation of V.A. claims and perpetuates an adjudicative atmosphere in which complicated claims almost never can be proved to the satisfaction of the V.A. In other less complex cases, the $10 limit similarly impairs the ability of claimants to formulate their grievances for unique reasons ranging from the illiteracy or incompetency of the veteran to individual proof problems which require professional assistance for proper development and presentation. In short, the fee limit impairs the ability of claimants to formulate their grievances in many instances which are incapable of precise categorization (*see, e.g.,* J.A. 244-245, 331-333), and thereby deprives them of receiving meaningful consideration of their claims by the V.A. This effectively denies veterans a meaningful right of petition and access to justice.[28]

B. This serious infringement of the First Amendment right of petition cannot be justified because the statutes advance no substantial government interest and, in any event, are overbroad.

The right of petition deserves the same constitutional protection as other First Amendment rights. *See United Mine Workers* v. *Illinois State Bar Association,* 389 U.S. at 222; *cf. Thomas* v. *Collins,* 323 U.S. 516 (1945) (right of assembly). Where First Amendment rights are at stake, government regulation is subject to exacting scrutiny, *Buckley* v. *Valeo,* 424 U.S. at 44-45, and it must be drawn with "narrow specificity." *NAACP* v. *Button,* 371 U.S. at 433, 438. Thus, any statute impinging on the effective exercise of First Amendment rights must substantially advance not only a legitimate government interest, but a compelling one, and even if it does, it must be drawn narrowly so as to infringe the First Amendment as little as is necessary to accomplish its purposes. *In re Primus,* 436 U.S. at 432; *Buckley* v. *Valeo,* 424 U.S. at 25, 64-65; *American Civil Liberties Union of New Jersey* v. *New Jersey Election Law Enforcement Commission,* 509 F. Supp. 1123, 1128-29 (D.N.J. 1981) (three-judge court); *Citizens Energy Coalition of Indiana, Inc.* v. *Sendak,*

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[28] Contrary to Appellants' assertion, the First Amendment issues presented here were not resolved in *Staub* v. *Roudebush,* 424 F. Supp. 1346, 1349 (D.D.C. 1976), *vacated and remanded,* 574 F.2d 637 (D.C.Cir. 1978) (Table). That case involved a claim that the fee limit improperly impaired claimants' right of association with attorneys and did not address at all the right of petition.

459 F. Supp. 248, 258 (S.D. Ind. 1978), *aff'd*, 594 F.2d 1158 (7th Cir. 1979).

The government's asserted interests in preserving the fee limitation were discussed at pp. 23-25, *supra*. A broad phrasing of those interests may make them appear more weighty than they are. Thus, "protecting the Federal fisc from fraud" or "promoting the welfare of veterans" are lofty-sounding goals which may pass for "compelling" interests when stated in the abstract. However, none of these interests, when considered in the context of V.A. claims adjudications, constitutes a compelling state interest. In any event, the $10 fee limit is not substantially related to achieving such goals.

At the very least, these goals could be achieved by far less drastic measures, such as reasonable yet realistic fee schedules or specific rules of procedure designed to foster informality while allowing attorney representation. We do not ask this Court to design such alternative rules, but where, as here, First Amendment rights are at stake, it is entirely proper for the Court to consider such legislative alternatives in assessing the validity of the means actually employed.

CONCLUSION

For the foregoing reasons, the order of the United States District Court for the Northern District of California preliminarily enjoining further enforcement of 38 U.S.C. §§ 3404-3405 should be affirmed in its entirety.

Respectfully submitted,

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No. 84-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, et al.,
Appellants,

VS.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al.
Appellees.

On Appeal from the United States District Court for the Northern District of California

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TABLE OF CONTENTS

	Page
Introduction and Summary of Argument	1
Argument	3
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

Baxter v. Palmigiano, 425 U.S. 308 (1976)	5
California Department of Human Resources Department v. Java, 402 U.S. 121 (1971)	8
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972)	3
Fusari v. Steinberg, 419 U.S. 379 (1975)	7
Gagnon v. Scapelli, 411 U.S. 778 (1973)	5
Goldberg v. Kelly, 397 U.S. 254 (1970)	7, 8
In re Gault, 387 U.S. 1 (1967)	5
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	5
Mathews v. Eldridge, 427 U.S. 319 (1976)	7, 8
Middendorf v. Henry, 425 U.S. 25 (1976)	5, 6
Morrissey v. Brewer, 408 U.S. 471 (1972)	5
NAACP v. Button, 371 U.S. 415 (1963)	3
Powell v. Alabama, 287 U.S. 45 (1932)	2, 4
Smith v. United States, 83 F.2d 631 (8th Cir. 1936)	6
United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217 (1967)	3
United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971)	3
Vitek v. Jones, 445 U.S. 480 (1980)	5, 6
Wolff v. McDonnell, 418 U.S. 539 (1974)	5, 6, 8

Page

TABLE OF AUTHORITIES CITED

Constitution

First Amendment 1, 2, 3, 4
Fifth Amendment 1, 3, 4

Other Authorities

38 CFR §§ 3.103(d), 17.150 7
38 U.S.C. § 3404 ..... 5, 6

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The Lawyers' Club of San Francisco, a voluntary bar association composed of more than 1,500 San Francisco attorneys, files this brief *amicus curiae* with the consent of the parties pursuant to the Rules of this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises the question of whether prohibiting applicants for veterans' benefits from paying a fee of more than $10 to an agent or attorney with respect to a benefit claim violates their First Amendment right to petition the government and Fifth Amendment right to procedural due process. Although the Lawyers' Club of San Francisco agrees generally with appellees' arguments on both the First and Fifth Amendment issues, we believe that two particular matters warrant further analysis.

First, appellants argue at length that the courts' traditional deference to statutorily designated hearing procedures precludes any substantial factual inquiry into whether denying claimants the right to hire an attorney or agent impairs their ability to pursue their benefit claims. At the same time, however, appellants also argue that because the administrative procedures are in fact "fair and effective without privately retained attorneys," there is no need to consider the contention that the First Amendment right to seek redress is being infringed. Appellants' First Amendment argument is inconsistent with their position regarding the scope of judicial review. Because of the importance of the First Amendment rights at stake when the government seeks to prohibit a private party from retaining counsel to prosecute a claim against it, a high degree of judicial scrutiny into the basis for the restriction is warranted. The court below properly considered the evidence in the record showing that denying the right to retain counsel abridged claimants' ability to present their cases effectively.

Second, appellants' argument that prohibiting claimants from hiring attorneys or agents comports with procedural due process rests on the assertion that the participation of such lawyers and agents would be fundamentally incompatible with the existing "informal and nonadversarial claims system." This contention is refuted by the fact that a claimant's right to representation, by both attorneys and agents, is now expressly permitted "at all stages of the administrative process." Moreover, what appellants describe as "skilled and expert" professional claims representatives supplied by veteran organizations, as well as *pro bono* lawyers, now represent many claimants throughout the claims process. In light of this existing system of claimant representation, a prohibition on the retention of paid representatives improperly denies veterans their due process "right to the aid of counsel when desired and provided by the party asserting that right." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

ARGUMENT

I.

This case poses the question of whether the government may prohibit a private party from retaining counsel to assist in prosecuting a claim against it. That question raises issues concerning both the right to petition the government guaranteed by the First amendment[1] and the right to procedural due process guaranteed by the Fifth Amendment.[2]

Appellants, however, attempt to obscure these two constitutional issues by blending them together. They argue on the one hand that the courts' traditional reluctance to question the wisdom of Congress severely limits any judicial inquiry into whether the prohibition on retaining private counsel deprives Veteran Administration ("VA") claimants of a fair and effective procedure for litigating their cases. Brief for Appellants ("VA Br.") at 33-46. At the same time, however, appellants also argue that because "the existing VA claims procedure is [in fact] fair and effective without privately retained attorneys, there is no basis in the First Amendment for inferring a right to counsel as necessary to effectuate" the First Amendment right to petition for redress of grievances. VA Br. at 47. Thus, by using a presumption of regularity applied in substantive due process cases,[3] appellants attempt to shield the First Amendment issues in this case from judicial scrutiny.

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[1] This Court has held that the right of speech and petition includes the right to seek civil and administrative remedies. *See, e.g., California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *NAACP v. Button*, 371 U.S. 415 (1963). It has also held that the right to litigate civil grievances can be infringed by denying a party (or others acting on his behalf) the right to engage and compensate counsel of his choice. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971); *United Mine Workers v. Illinois Bar Ass'n*, 389 U.S. 217 (1967).

[2] *See* Part II, *infra*.

[3] In noting that statutory claims procedures are entitled to a measure of judicial deference, we do not disagree with the District Court's

In our view, the relationship between the First and Fifth Amendment aspects of this case mandates a substantially different approach to determining whether factual questions concerning "the working of the VA benefit system," VA Br. at 38, could be considered in this case. Since, as appellants concede, the First Amendment issue turns on whether VA claimants are in fact afforded a "fair and adequate [procedure] without retained attorneys," VA Br. at 47, the District Court was obliged to consider that issue directly, rather than merely deferring to any presumptions of fairness that might attend statutory hearing procedures in other contexts. Any other approach to this case would, in our view, give too little importance to the First Amendment interests at stake when the government attempts to restrict the right of citizens litigating claims against it to secure legal representation.

After reviewing the factual record below, we agree with the District Court's finding that the overbroad limit on attorney's fees that may be paid voluntarily by veterans in service-connected death and disability cases, regardless of the nature, sophistication or intricacy of the issues involved, deprives substantial numbers of them of a "fair and effective" means of presenting their claims. J.S. App. 20a-38a. Accordingly, we fully support the District Court's ruling that the restriction on claimants' right to employ private counsel in such cases violates the First Amendment.

II.

Although a party's right to appear through legal counsel in civil matters is not absolute, it has historically been considered an important element of procedural due process. As the Court stated in *Powell v. Alabama*, 287 U.S. at 69-70:

> What, then, does a hearing include? Historically, and in our practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing before him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and therefore, of due process in the constitutional sense.

conclusion that any presumption of fairness was rebutted by the evidence presented in this case.

Recent cases in this Court have attached increased importance to the availability of legal representation in civil matters. For example, the issue of whether indigents in certain civil proceedings are entitled as a matter of due process to be furnished *appointed* counsel paid for by the state has sharply divided the Court in recent years. *E.g.*, *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (termination of parental rights); *Vitek v. Jones*, 445 U.S. 480 (1980) (involuntary transfer to mental hospital); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency determination). Although the Court's conclusion regarding the requirement of appointed counsel has varied with the particular facts and circumstances presented, all of these cases have approached the question from the premise that legal representation in civil adjudicatory proceedings contributes substantially to the fairness of the process.

There are, to be sure, a small number of situations where an individual may be denied the right to retain legal representation, even at his own expense. For example, in *Gagnon v. Scapelli*, 411 U.S. 778, 787 (1973), the Court held that parole or probation could be revoked without the presence of an attorney because "[t]he introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding." *See also Baxter v. Palmigiano*, 425 U.S. 308 (1976).[4] In *Middendorf v. Henry*,

[4] In holding that inmates in prison disciplinary hearing were not entitled to a lawyer, the Court in *Baxter* noted that changes in the hearing process in future years might "require further consideration and reflection of this Court." 425 U.S. at 324, quoting *Wolff v. McDonnell*, 418 U.S. 539, 572 (1974). The history of the procedure for adjudicating claims for veterans' service-connected death and disability

425 U.S. 25, 45 (1976), the Court held that the right to counsel could be denied in a summary court-martial because "presence of counsel will turn a brief, informal hearing which may be quietly and conveniently and rapidly concluded into an attenuated proceeding. . . ." In each of these instances, however, the Court has reiterated that the presence of counsel was incompatible with the orderly operation of the institution in question. As the Court stated in *Wolff v. McDonnell*, 418 U.S. at 560, "one cannot apply procedural rules designed for free citizens in an open society to the very different situation presented by a disciplinary proceeding in a state prison."[5]

In the present case, appellants do not question that the effect of 38 U.S.C. § 3404 is to deny VA claimants the right to retain private counsel. J.S. App. 22a.[6] They argue, however, that the VA service-connected death and disability benefit process is an "informal and nonadversarial claims system" and that the participation of privately retained claimant representatives would "alter substantially the nature of the proceeding." VA Br. at 30. There are, however, two basic flaws in this contention.

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benefits shows a substantial evolution since the predecessor of 38 U.S.C. § 3404 was enacted in 1862. At that time, filing a claim consisted merely of filling out forms, and the $10.00 fee limitation served "to protect veterans from extortionate fees for mere clerical assistance." *Smith v. United States*, 83 F.2d 631, 604 (8th Cir. 1936). Beginning in the 1930's, however, the procedure evolved into an extensive system of hearings and other adjudicatory processes. *See* Appendix I to the Brief for Appellees.

[5] Another situation where retained counsel may be denied is where the proceeding is either voluntary or subject to review in a subsequent hearing where counsel is allowed. *See, e.g., Middendorf v. Henry*, 425 U.S. at 46-47. Under 38 U.S.C. § 211(a), no subsequent judicial review of a VA determination is available.

[6] In *Vitek v. Jones*, 445 U.S. at 499, Justice Powell stated that procedural due process could be satisfied in certain cases by the appointment of a lay representative rather than a lawyer. Under 38 U.S.C. § 3404, the $10.00 fee limitation applies to non-lawyer agents as well as attorneys.

First, appellants' characterization of the "nonadversarial" VA claims process as being antithetical to the presence of counsel does not square with the VA's own administrative procedures. A claimant's right to representation, both by attorneys and agents, is in fact permitted by VA regulations "at all stages of the administrative process." VA Br. at 8; *see* 38 C.F.R. §§ 3.103(d); 17.150. As appellants note in their brief, professional claims representatives, supplied by veterans' organizations, represent many claimants throughout the VA's administrative proceeding, providing them with what appellants describe as "sophisticated and expert assistance in processing a claim." VA Br. at 29. Lawyers, serving as volunteers, *pro bono* counsel or legal aid attorneys, in fact appear in claims cases. VA Br. at 9.

The existence of a comprehensive procedure for claimant representation belies appellants' assertion that the presence of paid representatives would conflict with the VA's adjudicatory process. Appellants offer no explanation, let alone any evidence, of why paid counsel or agents would differ in any relevant respect from the attorneys or agents who represent VA claimants without charge. Appellants' argument that right to retain and compensate counsel would "fundamentally alter" VA procedures is without basis.

Second, the mere fact that VA administrative adjudications are "informal" or "nonadversarial" does not mean that the right to counsel is no longer a necessary ingredient of procedural due process. The terms "informal" and "nonadversarial" are typically applied to a variety of governmental benefit adjudications, such as those in the Social Security disability, unemployment insurance and welfare systems. *See Mathews v. Eldridge*, 424 U.S. 319, 339 (1976); *Fusari v. Steinberg*, 419 U.S. 379 (1975); *Goldberg v. Kelly*, 397 U.S. 254 (1970). While the "informal" character of these proceedings may warrant departing from such courtroom-type procedures as confrontation and cross-examination, *see Mathews v. Eldridge*, 424 U.S. at 348, it has never been held to justify the denying a claimant the right to retain legal counsel. To the contrary, in *Goldberg v. Kelly*, 397 U.S. at 270, the Court expressly held that a benefit recipient "must be allowed to retain an attorney if he so desires" in order for the

informal procedure to satisfy due process requirements.[7] After all, the purpose of the informal hearing "is to permit the claimant to present any evidence or arguments that bear on the claim," VA Br. at 6, not to avoid arguments or bar evidence.

Thus, the "informal" and "nonadversarial" nature of the VA benefits system does not warrant denying claimants their ordinary due process right to employ legal counsel to assist in presenting their case. The special considerations that have justified denying prison inmates, parolees and military personnel facing summary courts-martial the right to retain an attorney do not apply to persons applying for VA benefits. Disabled veterans are not only "free citizens in an open society," *Wolff v. McDonnell*, 418 U.S. at 560, they have earned their right to benefits in performing their military service. *Cf. California Department of Human Resources Department v. Java*, 402 U.S. 121, 131-32 (1971). A veteran, no less than a welfare recipient or a Social Security disability claimant, should be "allowed to retain an attorney if he so desires." *Goldberg v. Kelly*, 397 U.S. at 270; *cf. Mathews v. Eldridge*, 424 U.S. at 339, 349.

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[7] The Court in *Mathews v. Eldridge* reiterated that the claimant's right to counsel was an important factor in favor of permitting "informal" hearing procedures. 424 U.S. at 334, 349.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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No. 84-571

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE FEDERAL BAR ASSOCIATION AS AMICUS CURIAE

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QUESTION PRESENTED

Does a legitimate Governmental interest compel that veterans or their survivors seeking service-connected death and disability benefits from the Veterans Administration be denied the opportunity to retain counsel to act on their behalf, when the Veterans Administration is the only forum within which to claim such benefits and there is no right to judicial review of the decisions of the Veterans Administration with respect to such claims?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
INTEREST OF THE FEDERAL BAR ASSOCIATION	1
SUMMARY OF ARGUMENT	4
ARGUMENT	8
NO LEGITIMATE GOVERNMENTAL INTEREST COMPELS THAT VETERANS OR THEIR SURVIVORS BE DENIED THE OPPORTUNITY TO RETAIN COUNSEL, IF THEY WISH TO DO SO, TO REPRESENT THEM BEFORE THE VETERANS ADMINISTRATION	8
I. THE IMPORTANCE OF LEGAL ADVICE TO APPLICANTS FOR THESE BENEFITS COMPELS THAT THEY BE PERMITTED TO RETAIN COUNSEL IF THEY WISH TO DO SO	11
A. Because No Other Forum Exists Within Which Applicants May Show Their Entitlement To These Benefits, Special Care Must Be Taken To Assure Due Process of Law	11

	Page
B. Denying Veterans The Opportunity To Retain Counsel May Deny Them A Meaningful Opportunity To Be Heard	14
II. NO LEGITIMATE GOVERNMENTAL INTEREST COMPELS DENIAL OF COUNSEL, IF AN APPLICANT WISHES TO RETAIN ONE	19
A. The Asserted Paternalism Of The VA Is No Substitute For Retained Counsel.	19
B. Use Of Retained Counsel Should Not Be Incompatible With The VA's Conducting Its Proceedings In The Best Interests Of Veterans	22
C. The Government May Not Restrict Meaningful Access To VA Proceedings On The Assertion That VA Benefits Are "Gratuities".	24
III. PRECLUDING REPRESENTATION BY RETAINED COUNSEL IS OFFENSIVE TO BASIC NOTIONS OF HOW OUR FEDERAL AGENCIES SHOULD CONDUCT THEIR BUSINESS AND DISSERVES THE GOVERNMENT'S INTEREST	26

Page

A. In Representing Their Clients Loyally And Zealously, Veterans' Lawyers Will Facilitate The Even Administration of Justice In Conformity Witn The Law 26

B. Important Governmental Interests Are Served By Allowing Applicants To Retain Counsel If They Wish To Do So 29

CONCLUSION 30

TABLE OF AUTHORITIES

Cases — Page

Armstrong v. Manzo, 380 U.S. 545 (1965). 14

Boddie v. Connecticut, 401 U.S. 371 (1971). 5, 12-13

Evitts v. Lucey, 53 U.S.L.W. 4101 (U.S. Jan. 21, 1985) 25

Feres v. United States, 340 U.S. 135 (1950). 11

Goldberg v. Kelly, 397 U.S. 254 (1970). 6, 14-15, 25, 29

Hickman v. Taylor, 329 U.S. 495 (1947). 16

In re Gault, 387 U.S. 1 (1967). 6, 20, 21, 22

National Association of Radiation Survivors v. Walters, 589 F. Supp. 1302 (N.D. Cal. 1984). . 28

Powell v. Alabama, 287 U.S. 45 (1932) 14, 15

	Page
Shapiro v. Thompson, 394 U.S. 618 (1969).	6, 25
Upjohn Co. v. United States, 449 U.S. 383 (1981)	15-16
Statutes and Regulations	
38 U.S.C. § 211(a).	11-12
§ 3404	2
§ 3405	2
38 C.F.R. § 3.103(a).	21
§ 3.103(c).	27
Miscellaneous	
ABA Code of Professional Responsibility:	
Disciplinary Rules	
2-106	23
Ethical Considerations	
2-16	23
2-17	23
2-24	23
2-25	23
4-1	16

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE FEDERAL BAR ASSOCIATION AS AMICUS CURIAE

The Federal Bar Association, with the consent of the parties, submits this Brief as amicus curiae in support of Appellees.

INTEREST OF THE FEDERAL BAR ASSOCIATION

The Federal Bar Association is a professional association of approximately

14,500 lawyers and judges, the majority of whom are now or have been in service to the Federal Government. Its members are dedicated to advancing the science of jurisprudence and promoting the sound administration of justice and the highest quality representation before the Courts, departments, and agencies of the United States.

In this action, the United States District Court has enjoined enforcement, pendente lite, of 38 U.S.C. §§ 3404-3405, which impose a $10 limit on fees that may be charged for the representation of veterans, or their survivors, pursuing service-connected death and disability claims before the Veterans Administration. In 1983, the National Council of the Federal Bar Association approved a Resolution declaring that this fee limitation "works a hardship in depriving

applicants [for] veterans aid of necessary and adequate representation" and that attorneys representing such applicants should be permitted to charge a "fair and reasonable" fee. In the view of the Federal Bar Association, this fee limitation has outlived any perceived utility to the point that it now serves no legitimate Governmental purpose, and this ruling correctly foreshadows its demise.

The parties to this case necessarily must focus upon the facts and the law in the context of their own interests and the particular circumstances of this litigation. But the decision below, and the Constitutional infirmities of these statutory provisions, impact broadly upon the public's perception of how Federal agencies may conduct their business with an eye toward the even administration of

justice, not only for our Nation's veterans, but also for all our citizens. As a practical matter, these provisions deny veterans and their survivors the opportunity to employ counsel, if they choose, to establish their entitlement to these benefits in the only forum available to them. In these circumstances, denial of retained counsel, in the guise of concern for our veterans, is too severe to withstand Constitutional analysis, and is a disservice to the public, the Government, and ultimately the veterans themselves.

SUMMARY OF ARGUMENT

A. The Veterans Administration ("VA") is the only forum in which veterans or their survivors may enforce their statutory entitlement to service-connected death or disability benefits. There is no alternative remedy; there is no right

to appeal adverse VA determinations. In these circumstances, preclusion of retained counsel, engaged and paid by the applicants themselves, is incompatible with the fundamental fairness that the Due Process Clause requires. Boddie v. Connecticut, 401 U.S. 371 (1971).

B. To establish their entitlement to benefits, applicants necessarily must marshal evidence and meet the requirements of pertinent statutes and regulations, including a plethora of VA directives, decisions, and operating procedures. The presentation of a claim thus embraces the tasks that lawyers traditionally perform, and it is not surprising that the VA itself uses lawyers in these proceedings. Indisputably a lawyer's training and advice will increase the likelihood that an applicant's appearance before the VA will be a

"meaningful" appearance. E.g., Goldberg v. Kelly, 397 U.S. 254, 270-271 (1970).

C. No legitimate Governmental interest compels shutting the VA door to retained counsel. Appellants' suggestion that, because these benefits are assertedly "gratuities," the Constitution should tolerate an "experiment" that fails to comport with due process, or other Constitutional norms, is an argument long ago rejected by this Court. E.g., Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). The paternalistic notion that proceeding without legal advice is really in the veteran's best interest is punctured when the system as it actually operates is examined and the "claimed benefits [are] candidly appraised." In re Gault, 387 U.S. 1, 21-22 (1967). The Government's other asserted interests -- that there is some worth in keeping the

proceedings informal and that veterans and their survivors must be protected from unscrupulous lawyers -- simply do not warrant the draconian measure of restricting access to retained counsel. If informality is desirable, it need not be incompatible with legal representation. And the Government's concerns with respect to lawyers meeting their professional obligations may be met with alternative, less drastic measures, such as supervising and approving fee arrangements.

D. The Nation as a whole, including our Government, is served by Federal agencies' conducting their business in a way that ensures the sound administration of justice. The Government's interest also is served by maximizing recovery of these benefits by those entitled to receive them. The extensive District

Court Record, with findings that Appellants do not even attempt to challenge as clearly erroneous, reflects in detail the disturbing degree to which applicants for these benefits are disadvantaged by inability to retain counsel. The public's interest will be served by allowing applicants, if they choose to do so, to engage counsel committed to representing them competently, zealously, and loyally.

ARGUMENT

NO LEGITIMATE GOVERNMENTAL INTEREST COMPELS THAT VETERANS OR THEIR SURVIVORS BE DENIED THE OPPORTUNITY TO RETAIN COUNSEL, IF THEY WISH TO DO SO, TO REPRESENT THEM BEFORE THE VETERANS ADMINISTRATION.

Appellants argue that retained counsel is not "necessary" to a proceeding before the VA. The Disabled American Veterans, as amicus curiae supporting Appellants,

adds that opening up proceedings to retained counsel will sound the deathknell for those organizations that now provide non-legal representatives, free of charge, to applicants for these veterans benefits.

Both contentions miscast the issue. The real question is not merely whether the proceedings will be fairer with counsel present, although we believe, as the District Court found on the extensive evidence, that they indeed will be. Nor is it whether applicants must use retained counsel, to the exclusion of other or no representatives. Rather, the question is whether these statutes may stand even though they deny an applicant the freedom to retain a lawyer to appear on his behalf. No valid Governmental interest exists that compels this restriction on access to a lawyer's services.

Appellants speak of the proceedings before the VA as a Congressional "experiment." Applying terms currently in vogue to a restriction imposed over 120 years ago, and indeed in the absence of any real basis for the characterization, Appellants label the absence of counsel as part of a means for "alternative dispute resolution." Quite simply, however, applicants seeking these benefits cannot afford the luxury of this experiment. There is no other forum and no right to appeal. None of the methods of alternative dispute resolution currently popular, such as arbitration, "mini-trials" or "summary jury trials," commends the mandatory preclusion of counsel. Beyond doubt, procedures for resolving disagreements may be made simpler, quicker, and cheaper, without

also absolutely denying the right of a party to employ counsel if he wishes.

I. THE IMPORTANCE OF LEGAL ADVICE TO APPLICANTS FOR THESE BENEFITS COMPELS THAT THEY BE PERMITTED TO RETAIN COUNSEL IF THEY WISH TO DO SO.

A. Because No Other Forum Exists Within Which Applicants May Show Their Entitlement To These Benefits, Special Care Must Be Taken To Assure Due Process of Law.

Indisputably no forum other than the VA exists within which veterans or their survivors can obtain these benefits. No civil remedies are available to enable them to pursue such claims in litigation. E.g., Feres v. United States, 340 U.S. 135 (1950). The VA's determination "on any question of law or fact" is immune from any appeal. E.g., 38 U.S.C. § 211(a). Veterans and their survivors

have no choice but to pursue their application for statutory benefits as vigorously as possible before the VA.

In these circumstances, there must be a special sensitivity to the requirements of the Due Process Clause. In Boddie v. Connecticut, 401 U.S. 371 (1971), for example, the Court held that a State may not, solely because of inability to pay, deny access to its courts to individuals who seek judicial dissolution of their marriages. Critical to this holding was the "state monopolization of the means for legally dissolving" the marital relationship. 401 U.S. at 374.

> "Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle." 401 U.S. at 375.

The District Court found, on an extensive Record, that the $10 fee limitation operates for many applicants as a bar to deny "meaningful" access to the one available forum in which to claim these benefits. Here, no less than in Boddie, the VA's monopoly on the forum must be tempered by the requirements of the Due Process Clause. Forcing veterans to take their one bite of the apple without aid of counsel is a Constitutional anomaly, and should not be permitted to continue.

B. Denying Veterans The Opportunity To Retain Counsel May Deny Them A Meaningful Opportunity To Be Heard.

Over 50 years ago this Court stated, "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." Powell v. Alabama, 287 U.S. 45, 69 (1932). A bedrock principle of our jurisprudence is that assuring a "meaningful opportunity to be heard," see, e.g., Armstrong v. Manzo, 380 U.S. 545, 552 (1965), includes the opportunity to retain counsel.

> "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' . . . Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." Goldberg v. Kelly, 397 U.S. 254, 270-271 (1970), quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932).

The nature of the VA proceedings at bar underscores the importance of these principles. Simply stated, establishing eligibility to benefits requires proving the existence of a service-connected death or disability, frequently requiring the marshalling of many and complex facts, and making the appropriate causal connection to service in the Armed Forces. This assembly, study, and applying of facts to law -- sifting the relevant from the irrelevant -- is of course the ordinary work of lawyers; indeed, it lies at the very heart of the attorney-client relationship. See Upjohn Co. v. United States, 449 U.S. 383, 390-391

(1981); Hickman v. Taylor, 329 U.S. 495, 511 (1947); ABA Code of Professional Responsibility, Ethical Consideration 4-1. So, too, applying these selected facts to the pertinent laws and regulations is legal work. Knowledge of the pertinent statutes, the Code of Federal Regulations, the Federal Register, and the VA's internal operating procedures and directives, is, to say the least, beyond the ken of most laymen.

It is thus not surprising that the VA itself uses lawyers to handle these cases. Denying veterans the opportunity to employ their own counsel, with ethical obligations monitoring their service to their clients, is to stack the deck against the veterans. An illustration taken from the Brief for Appellants, describing how veterans may perfect an

administrative appeal within the VA, is instructive.

Under the regulations, a claimant is entitled to receive from the VA a "statement of the case" to help him perfect his appeal. The VA-prepared "statement of the case" is required to summarize the evidence pertinent to each issue as to which the claimant has "expressed disagreement." It must summarize the applicable law and regulations. And it must state the VA's determination on each issue, with the reasons given for each determination as to which the claimant has expressed disagreement. In all, the statement of the case must "be complete enough to allow" the claimant to present his written or oral arguments in the VA appeal. Brief for Appellants at 7 (citations and footnote omitted).

It is manifestly unfair to deny a veteran the opportunity to retain his own lawyer to review this work of a VA lawyer, so that his counsel may ensure that the statement of the case is in fact "complete enough" and that it fairly summarizes the evidence, states the legal issues, and summarizes the applicable law and regulations. These are legal concepts to which the training and experience of a legal advocate should be brought to bear. If a veteran desires to employ counsel, to obtain the professional advice of one specially trained in the resolution of disputes within the bounds of due process, he should not be denied that opportunity.

II. NO LEGITIMATE GOVERNMENTAL INTEREST COMPELS DENIAL OF COUNSEL, IF AN APPLICANT WISHES TO RETAIN ONE.

A. The Asserted Paternalism Of The VA Is No Substitute For Retained Counsel.

Relying on a paternalism that the District Court Record illustrates is more apparent than real, Appellants assert that the introduction of retained counsel into the veterans proceedings will inhibit their "informality" and "nonadversarial" nature. The proceedings, Appellants contend, currently are supposedly undertaken in the best interests of the veteran; denying a veteran the chance to speak through a lawyer is for his own good. Nearly 20 years ago, this Court considered and rejected similar arguments against the introduction of due process guarantees in proceedings to determine

juvenile delinquency and commitment. In re Gault, 387 U.S. 1 (1967).

In Gault, the State had argued that a juvenile benefits from the informal, supposed nonadversarial nature of the proceedings, assertedly undertaken in furtherance of parens patriae. 387 U.S. at 21-22, 25-27. This Court found, however, that "the appearance as well as the actuality of fairness, impartiality and orderliness -- in short, the essentials of due process -- may be a more impressive and more therapeutic attitude so far as the juvenile is concerned." 387 U.S. at 26. In words dramatically pertinent to this case, in which the District Court Record shows how in fact the veterans fare without counsel, this Court said, "[I]t is important, we think, that the claimed benefits . . . should be candidly appraised. Neither sentiment nor folk-

lore should cause us to shut our eyes" to the "startling findings" about failures of the system. 387 U.S. at 21-22. The extensive District Court Record, as summarized in the Brief for Appellees, provides the "startling findings" that the VA's supposed paternalism does not inure to the veterans' best interests. And indeed, in view of the mandate that VA employees may assist veterans to develop their claims "while protecting the interests of the Government," 38 C.F.R. § 3.103(a), the VA personnel possess a divided loyalty assuring that the VA cannot fully serve the best interests of the applicants.

B. Use Of Retained Counsel Should Not Be Incompatible With The VA's Conducting Its Proceedings In The Best Interests Of Veterans.

If "informality" be viewed as a desirable feature of these proceedings, it is certainly not impossible to conduct them with a measure of informality even with counsel present. Nor must it be that, because a veteran appears through counsel, the VA must exhibit less concern for the welfare of the applicant. See In re Gault, supra, 387 U.S. at 27.

There is nothing unique to veterans proceedings that should justify barring counsel. No such preclusion of lawyers appears in other forums designed particularly for the welfare of individuals, including individuals of low or modest means. Thus, counsel appear in workers compensation, social security, and civil

service proceedings. Counsel may appear in the small claims courts. And, of course, counsel are not barred from participating in arbitrations or other true "alternative" methods of dispute resolution that are designed to economize, expedite, and otherwise facilitate the resolution of controversies.

Appellants hypothesize a need to protect veterans against unscrupulous practices of lawyers. This intuitive indictment of the profession is an insult to the many Members of the Bar who conform their behavior to their professional obligations, including those requiring reasonableness of fees and service in the public interest. See, e.g., ABA Code of Professional Responsibility, Disciplinary Rule 2-106; Ethical Considerations 2-16, 2-17, 2-24, 2-25. Moreover, allowing counsel to participate, when applicants

want counsel to participate, does not require that there be no monitoring of fee agreements or fee awards. Just as in workers compensation proceedings under many statutory schemes, fees paid to counsel may be made subject to review and approval. In short, there are certainly alternative, less drastic means to undertake the monitoring of lawyers that Appellants deem necessary. No reason exists in law or logic automatically and conclusively to deny veterans the opportunity to select and retain counsel to represent their interests.

C. The Government May Not Restrict Meaningful Access To VA Proceedings On The Assertion That VA Benefits Are "Gratuities."

Appellants argue that there should be "wide latitude" with respect to "the process by which claims are adjudicated

and benefits paid," "[b]ecause VA benefits are 'gratuities' that are funded entirely from public appropriations and do not involve financial contributions from veterans." Brief for Appellants at 32 (citations omitted). This argument resurrects a contention long rejected by this Court in Governmental benefits cases. A procedure Constitutionally defective may not be saved by an invocation that the public-assistance benefit involved is "'a "privilege" and not a "right."'" Goldberg v. Kelly, 397 U.S. 254, 262 (1970), quoting Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969). See also Evitts v. Lucey, 53 U.S.L.W. 4101, 4105 (U.S. Jan 21, 1985) ("when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution --

and, in particular, in accord with the Due Process Clause"). The Government may not with one hand extend an entitlement to benefits, while with the other it erects impermissible barriers to those claiming their statutory entitlements.

III. PRECLUDING REPRESENTATION BY RETAINED COUNSEL IS OFFENSIVE TO BASIC NOTIONS OF HOW OUR FEDERAL AGENCIES SHOULD CONDUCT THEIR BUSINESS AND DISSERVES THE GOVERNMENT'S INTEREST.

A. In Representing Their Clients Loyally And Zealously, Veterans' Lawyers Will Facilitate The Even Administration Of Justice In Conformity With The Law.

This case presents an unfortunate, stark contrast between the apparent and the real. Appellants' Brief surveys the law and the regulations and blithely ignores the extensive District Court Record of how the system actually works.

But any overall impression of fairness is belied by reality.

To cite but one example, Appellants note that, pursuant to 38 C.F.R. § 3.103(c), a claimant is "entitled to a hearing at any time on any issue involved in a claim." At the hearing, the claimant may "present any evidence or arguments that bear on the claim"; and it "is the responsibility of the Veterans' Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position." Id., quoted in Brief for Appellants at 6.

In practice, the District Court found, based upon the evidence, that the VA "discourages applicants from exercising their right to request a hearing at any

time until after the initial determination has been made in their case, even though this denial precludes claimants from having direct input into the most critical stage of the adjudication of their claim." National Association of Radiation Survivors v. Walters, 589 F. Supp. 1302, 1321 (N.D. Cal. 1984).

If veterans are able to employ counsel, the likelihood is greater that claims determinations will be made after all competing or complementary interests are considered. The risk of overreaching, summary decisionmaking, or otherwise ignoring rules designed to ensure fairness will be minimized. And all the Nation, including its veterans, benefits from the sound administration of justice.

B. Important Governmental Interests Are Served By Allowing Applicants To Retain Counsel If They Wish To Do So.

The very provision of these benefits to veterans and their families reflects the Nation's interest in providing for those who have served their country. The Government's interest is served by assuring that all those entitled to these benefits receive them, and that the level and duration of benefits continue to the maximum extent permitted by law. The Government is thus served by lawyers who, in discharge of their professional obligations, seek to maximize the benefits awarded to their clients. See Goldberg v. Kelly, 397 U.S. 254, 264-265 (1970).

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

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No. 84-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

HARRY N. WALTERS, Administrator of Veterans Administration; THE UNITED STATES OF AMERICA; THE VETERANS ADMINISTRATION; PAUL D. ISING, Director, Northern California Regional Office, Veterans Administration,
Appellants,

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation; SWORDS TO PLOWSHARES VETERANS RIGHTS ORGANIZATION, a California non-profit corporation; DON E. CORDRAY, an individual; ALBERT R. MAXWELL, an individual; REASON F. WAREHIME, an individual; DORIS WILSON, an individual,
Appellees,

and

AMERICAN G.I. FORUM, a national non-profit corporation,
Intervenor-Appellee.

Direct Appeal From the United States District Court For the Northern District of California

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED

The question presented by appellants is not properly framed in that it fails to mention the as-applied nature of appellees' constitutional challenges and the abuse of discretion standard of review applicable to preliminary injunctions. The questions presented are properly framed as follows: Did the district court abuse its discretion in holding:

1. That appellees were likely to succeed on the merits of their claim that, as applied, 38 U.S.C. Sections 3404-05, which prescribe a $10 maximum attorney's fee a veteran may pay an attorney from his/her own funds to represent the veteran in connection with service-connected death and disability compensation claims and impose criminal sanctions (the "fee limitation"), violate their procedural due process rights in light of the district court's factual findings.

2. That appellees were likely to succeed on the merits of their claims that the fee limitation, as applied, violates their First Amendment rights to meaningful access to the VA adjudication system in light of the district court's factual findings.

TABLE OF CONTENTS

	Page
Table of authorities cited	iv
Table of abbreviations	xii
Statutes and regulations involved	1
Statement of the case	1
I. The nature of this action	1
II. Basic description of VA adjudication system	2
III. The adverse consequences of the fee limitation are well documented in the record	12
Summary of argument	20
Argument	23
I. The fee limitation deprives appellees of due process	23
A. VA has conceded that appellees possess a property interest	23
B. Due process requires that appellees be permitted to retain counsel unhampered by the $10.00 fee limitation	24
1. Veterans have strong interests in obtaining SCDD and securing legal assistance	25
2. VA's interest in preserving the fee limitation is inconsequential	33
II. The fee limitation violates appellees' First Amendment rights of petition, speech and association	34

TABLE OF CONTENTS

	Page
A. The fee limitation deprives the individual appellees of meaningful access to the VA adjudication system	34
B. The fee limitation violates the First Amendment rights of organizational appellees to obtain effective legal representation for their members or constituents	37
C. The fee limitation serves no substantial governmental interest	38
III. Congress has made no factual findings concerning the fee limitation to which the district court should have deferred	39
A. Congress has made no factual findings concerning the fee limitation	39
1. Congress made no findings of fact when it enacted the fee limitation	40
2. The court should not defer to unsworn VA statements before congressional committees or to Senate Committee reports concerning bills that died in House Committee	41
B. The abject deference to congressional action or inaction sought by VA is inappropriate in a procedural due process or First Amendment case	44
Conclusion	50
Appendix H	79a
Appendix I	101a

TABLE OF AUTHORITIES CITED

Cases

Page

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) ... 39
Allen v. United States, 588 F. Supp. 247 (D. Utah 1984) 9
Arnett v. Kennedy, 416 U.S. 134 (1974) 45, 49
Barnett v. Lindsay, 319 F. Supp. 610 (D. Utah 1970) .. 24
Batchelder v. Kenton, 383 F. Supp. 299 (C.D. Cal. 1974) 28, 29
Bates v. State Bar of Arizona, 433 U.S. 350 (1977) ... 35
Baxter v. Palmigiano, 425 U.S. 308 (1976) 26
Black Coalition v. Portland School District No. 1, 484 F.2d 1040 (9th Cir. 1973) 26, 28
Block v. Hirsh, 256 U.S. 135 (1921) 47
Boddie v. Connecticut, 401 U.S. 371 (1971) 29, 32
Bounds v. Smith, 430 U.S. 817 (1977) 35
Bread Political Action Committee v. Federal Election Commission, 455 U.S. 577 (1982) 44
Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1 (1964) 25, 35, 37
Brown v. Chote, 411 U.S. 452 (1973) 22
Buckley v. Valeo, 424 U.S. 1 (1976) 36, 38
California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 35
Carey v. Population Services International, 431 U.S. 678 (1977) 47
Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied*, 401 U.S. 1003 (1971) 28
Clark v. Paul Gray, Inc., 306 U.S. 583 (1939) 48
Cleaver v. Wilcox, 499 F.2d 940 (9th Cir. 1974) 28
Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973) 49

TABLE OF AUTHORITIES CITED

CASES

Page

Communist Party of United States v. Subversive Activities Control Board, 367 U.S. 1 (1961) 47, 48
Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 44
Crook v. Baker, 584 F. Supp. 1531 (E.D. Mich. 1984) 28
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) 32
Daniels v. Woodbury County, Iowa, 742 F.2d 1128 (8th Cir. 1984) 23
Davis v. United States, 415 F. Supp. 1086 (D. Kan. 1976) 24, 28
deMagno v. United States, 636 F.2d 714 (D.C. Cir. 1980) 19
Demarest v. United States, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2150 (1984) 32, 39
Devine v. Cleland, 616 F.2d 1080 (9th Cir. 1980) 24
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 22
Dothard v. Rawlinson, 433 U.S. 321 (1977) 39
Economic Development Corp. v. Model Cities Agency, 519 F.2d 740 (8th Cir. 1975) 21
Edelman v. Jordan, 415 U.S. 651 (1974) 31
Elliott v. Weinberger, 564 F.2d 1219 (9th Cir. 1977), *aff'd in part and reversed in part sub nom.* California v. Yamasaki, 442 U.S. 682 (1979) 45, 46
Feinberg v. Federal Deposit Insurance Corp., 420 F. Supp. 109 (D.D.C. 1976) 28
Feres v. United States, 340 U.S. 135 (1950) 29
Ferguson v. Metropolitan Development and Housing Agency, 485 F. Supp. 517 (M.D. Tenn. 1980) 28
Gagnon v. Scarpelli, 411 U.S. 778 (1973) 28, 30
Galvan v. Levine, 490 F.2d 1255 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) 44, 45
Gemsco, Inc. v. Walling, 324 U.S. 244 (1944) 42

TABLE OF AUTHORITIES CITED
CASES

Page

Gendron v. Saxbe, 389 F. Supp. 1303 (C.D. Cal.), *aff'd per curiam sub nom.* Gendron v. Levi, 423 U.S. 802 (1975) 31, 32, 33, 39

Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) 35

Goldberg v. Kelly, 397 U.S. 254 (1970) 24, 27

Goss v. Lopez, 419 U.S. 565 (1975) 26

Griffeth v. Detrich, 603 F.2d 118 (9th Cir. 1979), *cert. denied,* 445 U.S. 970 (1980) 24

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 31

Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983) 49

In re Agent Orange Product Liability Litigation, MDL 381 (E.D.N.Y. filed Feb. 23, 1979) 9

In re Gault, 387 U.S. 1 (1967) 30

In re Primus, 436 U.S. 412 (1978) 38

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951) 46

Kelly v. Railroad Retirement Board, 625 F.2d 486 (3d Cir. 1980) 23, 24

Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 46, 47

Lassiter v. Department of Social Services of Durham County, North Carolina, 452 U.S. 18 (1981) 27, 28

Leary v. United States, 395 U.S. 6 (1969) 47

Little v. Streater, 452 U.S. 1 (1981) 46

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 27

TABLE OF AUTHORITIES CITED
CASES

Page

Mandel v. Bradley, 432 U.S. 173 (1977) 31

Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982) 35

Martinez v. Bynum, 461 U.S. 321 (1983) 32

Mathews v. Eldridge, 424 U.S. 319 (1976) 24, 25, 29, 46

Middendorf v. Henry, 425 U.S. 25 (1976) 28, 49

Morrissey v. Brewer, 408 U.S. 971 (1972) 46

NAACP v. Button, 371 U.S. 415 (1963) 35, 37, 38

New York ex rel. Rosevale Realty Co. v. Kleinert, 268 U.S. 646 (1925) 39

Officers for Justice v. Civil Service Commission of City and County of San Francisco, 371 F. Supp. 1328 (N.D. Cal. 1973) 45

Oregon v. Mitchell, 400 U.S. 112 (1970) 48

Parham v. J.R., 442 U.S. 584 (1979) 27, 46

Peck v. Heurich, 167 U.S. 624 (1897) 39

Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1975) 24

Porter v. Califano, 592 F.2d 770 (5th Cir. 1979) 38

Powell v. Alabama, 287 U.S. 45 (1932) 29

Radice v. New York, 264 U.S. 292 (1924) 48

Rast v. Van Deman & Lewis Co., 240 U.S. 342 (1916) 48

Red Lion Broadcasting Co., Inc. v. Federal Communications Commission, 395 U.S. 367 (1969) 42, 43

Ressler v. Pierce, 692 F.2d 1212 (9th Cir. 1982) 23, 28

Rostker v. Goldberg, 453 U.S. 57 (1981) 48

Ruckelshaus v. Monsanto Co., 104 S.Ct. 2862 (1984) .. 48

Russell v. Cunningham, 233 F.2d 806 (9th Cir. 1956) .. 21

Sandford v. R.L. Coleman Realty Co., Inc., 573 F.2d 173 (4th Cir. 1978) 45

TABLE OF AUTHORITIES CITED
CASES

Page

Sanitary Refrigerator Co. v. Winters, 280 U.S. 30 (1929) 45

Santosky v. Kramer, 455 U.S. 745 (1982) 46

Sartain v. Securities and Exchange Commission, 601 F.2d 1366 (9th Cir. 1979) 28

Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) 24

Schweiker v. McClure, 456 U.S. 188 (1982) 27

Secretary of State of Maryland v. Joseph H. Munson Co., Inc., 104 S. Ct. 2839 (1984) 38

Selective Service System v. Minnesota Public Interest Research Group, 104 S.Ct. 3348 (1984) 44

Shaw v. Weinberger, 395 F. Supp. 268 (W.D.N.C. 1975) 24

Texaco, Inc. v. Short, 454 U.S. 516 (1982) 48

Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980) 45

Turner v. United States, 396 U.S. 398 (1970) 47

United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida, 493 F.2d 799 (5th Cir. 1974) 45

United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967) 35, 37

United States v. Brandon, 584 F. Supp. 803 (W.D.N.C. 1984) 19

United States v. Carolene Products Co., 304 U.S. 144 (1938) 48

United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950) 20

United States v. United Mine Workers of America, 330 U.S. 258 (1947) 43, 44

TABLE OF AUTHORITIES CITED
CASES

Page

United States v. United States Gypsum Co., 333 U.S. 364 (1941) 20

United Transportation Union v. State Bar of Michigan, 401 U.S. 576 (1971) 35, 37

Van Huffel v. Harkelrode, 284 U.S. 225 (1931) 39

Vance v. Bradley, 440 U.S. 93 (1979) 48, 49

Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 38, 39

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 38

Virginian Railway Co. v. Mullens, 271 U.S. 220 (1926) 39

Vitek v. Jones, 445 U.S. 480 (1980) 28, 45

Vulcan Society of New York City Fire Department v. Civil Service Commission of the City of New York, 360 F. Supp. 1265 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973) 45

Weinberger v. Rossi, 456 U.S. 25 (1982) 44

Whitney v. California, 274 U.S. 357 (1927), *overruled*, Brandenburg v. Ohio, 395 U.S. 444 (1969) 32, 47

Wolff v. McDonnell, 418 U.S. 539 (1974) 26

Wong Yang Sung v. McGrath, 339 U.S. 33, *modified*, 339 U.S. 908 (1950) 42

Wright v. Califano, 587 F.2d 345 (7th Cir. 1978) 24

Zablocki v. Redhail, 434 U.S. 374 (1978) 32

Table of Authorities Cited

Constitution, Statutes, Regulations and Rules

	Page
U.S. Const:	
Amend. I	passim
Amend. V (Due Process Clause)	passim
Amend XIV (Due Process Clause)	28
Act of Sept. 2, 1958, Pub. L. 85-855, 72 Stat. 1105	40
National Labor Relations Act, Pub. L. 198, 49 Stat. 449 (1935)	40
Veterans' Benefits Act of 1957, Pub. L. 85-56, 71 Stat. 83	40
28 U.S.C. §§ 1346(b), 2671 *et seq.*	29
38 U.S.C.:	
§ 101	4
§ 211(a)	29
§ 310	4
§ 321-22	4
§ 331	4
§ 341-42	4
§ 355	4
§ 4004(c)	6
§ 4005	5
§ 4005(d)(5)	5
38 C.F.R.:	
§ 3.102	4
§ 3.103	4
§ 3.103(a)(1983)	17
§ 3.103(c)	15
§ 3.103(d)	36
§§ 3.12-3.15	4
§ 3.158(a)	13
§§ 4.1-4.150	4
§ 4.71(a)	4
§ 19.118	5
§ 19.119(a)	5
§ 19.119(b)	5
§ 19.120	5
§ 19.121(b)(3)	5

Table of Authorities Cited

Constitution, Statutes, Regulations and Rules

	Page
§ 19.123(a)	5
§ 19.126	5, 10
§ 19.129(b)	5
§ 19.150	36
§ 19.165(a)	5
§ 19.182	5
Fed. R. Civ. P. 52(a)	20

Legislative Materials and Other Authorities

Goldhammer, Veterans Disability Benefits: The Last Sad Stronghold of Untrammelled Administrative Discretion, 8 Bev. Hills B.J. 33 (1974)	19
S.330, 96th Cong., 1st Sess. (1979)	42
S.349, 97th Cong., 2d Sess. (1982)	42
S.636, 98th Cong., 1st Sess. (1983)	41
S.Rep. No. 97-466, 97th Cong., 2d Sess. (1982)	34. 43
Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Proposals: Hearing on S.636 and Related Bills Before the Senate Comm. on Veterans' Affairs, 98th Cong., 1st Sess. (1983)	42, 43, 44
Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearing on S.349 and Related Issues Before the Senate Comm. on Veterans's Affairs, 97th Cong., 1st Sess. (1981)	43, 44

TABLE OF ABBREVIATIONS

I. BRIEF AND OTHER FILINGS

Title	Abbreviation
Record	R
Jurisdictional Statement filed October 9, 1984	JS
Jurisdictional Statement, Appendix A (District Court Opinion)	Op.
Appellees' Motion to Affirm filed November 14, 1984	MA
Joint Appendix dated December 10, 1984	JA
Brief for Appellants dated January 1985	BFA

II. DECLARATIONS AND AFFIDAVITS

Name	Description	Abbreviation
Bitzer, Ronald M.	Claims Agent	Bit.
Caron, Martha L.	Attorney	Caron
Cordray, Don E.	SCDD recipient	Cor.
Dempsey, Lola	SCDD applicant (widow)	Demp.
Derhagg, James J.	Special Assistant to BVA Chairman	Der.
Gretenhart, Frederick H.	Attorney (Swords to Plowshares)	Gret.
Miles, Herbert	Attorney (Swords to Plowshares)	Miles
Ram, Michael F.	Attorney	Ram
Siemers, Steven W.	Attorney	Siem.
Stavick, Margaret	Attorney, PTSD claims	Stav.
Turcotte, Thomas W.	Attorney	Tur.
Udall, Stewart L.	Attorney	Udall

III. AGENCIES, COMMITTEES, PROCEDURAL TERMS

Title	Abbreviation
Board of Veterans Appeals	BVA
Disabled American Veterans (*amicus curiae*)	DAV
House Veterans Affairs Committee	HVAC
National Association of Radiation Survivors	NARS
Notice of Decision	ND
Notice of Disagreement	NOD
Post-traumatic stress disorder	PTSD
Substantive Appeal	SA
Service-connected death and disability compensation	SCDD
Senate Veterans Affairs Committee	SVAC
Statement of the Case	SOC
Swords to Plowshares	Swords
Veterans Administration	VA

No. 84-571

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

HARRY N. WALTERS,
Administrator of Veterans Administration, et al.,

Appellants,

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, et al.,
Appellees.

Direct Appeal From the United States District Court For the Northern District of California

BRIEF FOR APPELLEES

STATUTES AND REGULATIONS INVOLVED

See Appendix H hereto.

STATEMENT OF THE CASE

I. THE NATURE OF THIS ACTION

This is an appeal of a preliminary injunction entered June 12, 1984, in this action by three disabled atomic veterans and an atomic veteran's widow and two non-profit organizations, the National Association of Radiation Survivors ("NARS") and Swords to Plowshares Veterans Rights Organization ("Swords"), challenging the constitutionality of the $10 attorney's fee limitation applicable to VA service-connected death and disability compensation ("SCDD") claims.[1] The fee limitation prohibits veterans from paying an attorney more than $10 from

[1] NARS is comprised principally of survivors of the atomic bomb testing program, including many SCDD recipients. Swords is a VA

their own funds to advise or represent them, and imposes criminal penalties. After extensive discovery and briefing, the district court issued a preliminary injunction, making detailed factual findings that are summarized below. Applying the traditional preliminary injunction analysis, the district court rested its ruling concerning probability of success on the merits on two independent legal grounds—that the fee limitation, as applied, violated appellees' rights to procedural due process and their First Amendment rights to meaningful access to the VA adjudication system.

II. BASIC DESCRIPTION OF VA ADJUDICATION SYSTEM

VA does not dispute the district court's findings regarding irreparable injury and balance of hardships. VA addresses only limited aspects of the factor of probability of success on the merits. First, VA argues, contrary to an extended line of decisions requiring deference to the factual findings below, that the "factual proceedings in the district court are irrelevant." (BFA 22). Indeed, VA's brief is devoid of citation to the extensive record below, and VA does not dispute that the record supports the district court's findings. Second, having so readily disposed of the district court's express factual findings and record, VA asks the Court to substitute a different "record" based upon a hodgepodge of selected excerpts from unsworn statements of VA officials before legislative committees and Senate committee reports concerning bills that died in House committee.[2] VA

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accredited service organization serving Vietnam veterans and specializing in SCDD claims caused by stress or arising out of exposure to Agent Orange. Appellees refer the Court to the Statement of the Case in the *amicus curiae* brief filed by the National Association of Atomic Veterans for the facts concerning the claims and circumstances of the individual appellees.

[2] VA, of course, had extensive opportunity below to counter appellees' factual showing. It chose not to do so. An appellant's obligation is to set forth the facts upon which it bases its appeal in its opening brief, allowing appellee an opportunity to respond. VA did not do so, but purported to "reserve" the opportunity to "respond" to appellees' "factual submissions" drawn from the record in its reply brief "to the extent it proves necessary to this Court's understanding of the case. . . ." (BFA 35 n.35). To allow VA to do so would be unfair to appellees, who will have no opportunity to respond.

neither presented any of this material nor raised any argument concerning it below. Moreover, the conclusions VA draws from these selected legislative excerpts often directly conflict with express findings of the district court. For example, the district court expressly found that access to retained counsel was necessary to a fair procedure (Op. 38a); VA, however, consistently claims to the contrary. (BFA 15, 17, 19). Similarly, the district court found that "representation" by lay service representatives was inadequate (Op. 32a, 33a, 36a-38a); yet VA insists upon describing such representation as "adequate," even "expert." (BFA 17, 26). As the discussion below demonstrates, the district court's findings of fact, based upon the actual operation of the VA adjudication system, are crucial to its holding that appellees were likely to succeed on the merits of their claims that the fee limitation, as applied, violates their procedural due process and First Amendment rights. As unpalatable as VA finds the "factual proceedings" below, it is the district court's findings upon which its appeal must depend. The following summary of the VA adjudication system is based upon the district court's findings of fact and uncontroverted facts below.

In contrast to the basic pension benefits available between the Civil War and the New Deal, application for which merely required clerical assistance (MA App. E; App. I), a variety of veterans benefits now exists, including SCDD. SCDD is analogous to Social Security disability benefits and worker's compensation, and involves

> payment for an injury . . . or death following from official duties in service. And the government has an obligation to compensate for that injury. It's a payment in lieu of what would have been continued in service. . . . The amount compensated in a disability is supposed to be an amount equal to . . . what would be anticipated as lost wages from that type of injury in the civilian labor fields. . . .

(JA 378; *see also* JA 457-58). Each of the SCDD authorizing statutes lists the requirements for awarding compensation under the heading "Basic entitlement" and expresses that entitlement

in mandatory terms. 38 U.S.C. §§ 310, 321-22, 331, 341-42; (App. H 80a-83a). The veteran possesses the burden of proof to establish active duty military service, a discharge other than dishonorable, and a service-connected disability that was not the result of his or her own willful misconduct. 38 U.S.C. § 101; 38 C.F.R. §§ 3.102, 3.12-3.15.

Initial SCDD claims are made to one of fifty-seven VA regional offices. A veteran must "submit evidence sufficient to justify a belief in a fair and impartial mind that [the] claim is well grounded." 38 C.F.R. § 3.102. "The development of a factual record at the regional level is the most crucial aspect of a new claim, since the VA decision rests on this record." (R 73 Ex. 70 at 70). Veterans theoretically may obtain a hearing "at any time on any issue" and a hearing transcript, may present witnesses and submit documentary and other evidence, and may appeal adverse VA decisions to the Board of Veterans Appeals ("BVA"). 38 C.F.R. § 3.103; (R 78 Ex. 19 at 105). In most cases, a three-member "rating board," consisting of medical, legal, and occupational "specialists," reviews the veteran's submissions, and prepares a "rating" either granting or denying the claim. *See* 38 U.S.C. § 355; (*e.g.*, R 71 Exs. 30, 34, 37; R 76 Exs. 161, 165). A regulation requires the rating board to cast "reasonable doubt" in favor of the veteran. 38 C.F.R. § 3.102. However, VA adjudicators construe the reasonable doubt standard to require the claimant to show "a probability of entitlement." (JA 277; *see also* JA 462-63, 466; R 157 at 31-32). Rating boards use a complicated schedule for rating disabilities which prescribes specific disability percentages for thousands of conditions. 38 C.F.R. §§ 4.1-4.150. For example, the rating schedule assigns a 50% rating for loss of an area of the skull larger than a 50-cent piece without a brain hernia. 38 C.F.R. § 4.71(a)(5296).

VA claim denials are communicated in a computer notice called a Notice of Decision ("ND"), which perfunctorily expresses a denial without factual findings or explanation. (JA 95, 386; *see also* JA 609; R 71 Ex. 21). The VA maintains no statistics as to SCDD outright denial rates. However, an informal tally by the Northern California Regional Office disclosed a denial rate of 60% for all VA benefit claims. (R 143 at 164).

Also, many successful SCDD applicants disagree with the percentage disability rating VA assigns. (JA 387). Failure of proof is a frequent basis for denial of SCDD claims. (JA 223-24, 609). To challenge an adverse decision, a veteran must file a "Notice of Disagreement" ("NOD") within one year. 38 U.S.C. § 4005; 38 C.F.R. §§ 19.118, 19.119(a). If VA declines to reconsider upon receiving the NOD, it prepares a "Statement of the Case" ("SOC"), framing the issues for appeal. (R 158 at 303). The SOC summarizes the decision, factual record, and applicable law, 38 C.F.R. §§ 19.119(b), 19.120, and constitutes the regional office's final decision. (*See, e.g.*, R 70 Exs. 167 at 101-05, 168 at 135-41). "If the claimant takes no action to follow up on the NOD (which is frequently the case), the file is closed." (JA 555; *see also* JA 590-97).

VA regulations have many procedural requirements which are pitfalls for the unwary, such as jurisdictional time limitations. *See* 38 C.F.R. §§ 19.119(a), 19.126; (JA 193-94). To perfect the appeal, the veteran must file a substantive appeal ("SA") within sixty days from the date the SOC is mailed. 38 C.F.R. § 19.129(b). The SA must "set out specific arguments relating to errors of fact or law." 38 C.F.R. § 19.123(a). SAs failing to satisfy these requirements are subject to summary dismissal. 38 U.S.C. § 4005(d)(5); 38 C.F.R. § 19.126. The veteran is conclusively presumed to agree with every statement of fact contained in the SOC to which no exception is taken in the SA. 38 C.F.R. § 19.121(b)(3). The district court found that "[v]eterans' failure to comply with the VA's procedural regulations may result in denial of their claims." (Op. 30a).

When an SA is filed, the original claim file is sent to BVA in Washington, D.C. for decision. (R 158 at 354-55; *see also* R 158 Ex. 87). Argument and testimony may be presented to a BVA panel, 38 C.F.R. § 19.182, but fewer than 5% of BVA appeals result in personal hearings. (JA 555). The remainder of BVA appeals are resolved upon the written record transmitted by the regional office, together with a short written statement of the veteran's contentions. (*Id.*). BVA "will not require the appearance of any Veterans Administration official or other person" at BVA hearings. 38 C.F.R. § 19.165(a). BVA is bound by VA regulations, instructions of the VA Administrator, and precedent

opinions of the VA general counsel. 38 U.S.C. § 4004(c). BVA reverses regional office decisions in 13% of perfected appeals, and remands an additional 15% for the development of further evidence. (JA 584; R 157 at 134-35).

The district court found that SCDD claims often present complicated questions concerning the degree of disability, service connection, and causation and that "[b]oth the procedures and the substance entailed in presenting SCDD claims to the VA are extremely complex." (Op. 30a-31a). VA conceded that "the claims process is a very complicated process . . . ." (JA 426). VA rules, regulations, and procedures concerning SCDD are set forth in multiple sources and are intricate and extensive, comprising many thousands of pages. These sources contain complicated rules and procedures concerning available benefits, claims development, eligibility, ratings, computations, elections, presumptions, severance, fraud, forfeitures, recoupment, appeals, and a host of other subjects.[3] Most procedural and substantive rules are not promulgated as part of any rule-making procedure and are unavailable to veterans. A recent government study concluded: "Veterans law consists of a large and relatively complicated body of statutes and regulations that is overwhelming to legal services staff not required to deal with it regularly." (JA 553; *see also* JA 476-77; R 66 Siem. Decl. ¶3; R 71 Ex. 21; R 157 at 46). Substantive or procedural rules from different VA

[3] These sources include the Procedural Manual M-21-1 (JA 511), BVA Manual (R 71 Ex. 45), Program Guide 21-2 (R 78 Ex. 19), circulars (*e.g.*, R 72 Exs. 3, 5); Field Appellate Procedures Manual M1-1 (R 76 Ex. 150), adjudication memoranda (JA 413; R 158 Ex. 85); "informal" memoranda (*e.g.*, JA 436-39, 512-13), precedent opinions of the general counsel (JA 368), and BVA decisions (*e.g.*, R 76 Ex. 159). *See also* 38 C.F.R. At least one VA regional office recently purchased a computer to attempt to keep track of these multiple sources. (JA 393-94). "That's the basic point that we have many directives. And it's a matter of knowing all of them that pertain to a particular point. So it behooves one to keep a cross index. But they are one as binding as another." (JA 418). "[A]rbitrary and unpublished changes in these rules place any individual veteran without representation at an unfair disadvantage." (R 66 Miles Decl. ¶ 5). Many of the VA's regulations and procedures have no clear statutory basis. (R 72 Ex. 114 at 26).

sources may conflict, and misapplication of presumptions by VA adjudicators is a persistent problem. (JA 247-49, 259-60, 401-11, 425-26, 476-77; R 66 Siem. Decl. ¶3; R 67 Stav. Aff. ¶5; R 71 Ex. 21; R 157 at 46).

The district court found that extensive investigation, documentation, legal analysis, and preparation are necessary to mount convincing SCDD claims, and that the services of attorneys are essential. (Op. 26a-36a, 39a). (Despite these express findings, VA repeatedly and baldly states that "retained counsel is not necessary to a fair procedure." (BFA 15, 17, 19)). Most veterans are unacquainted with VA substantive and procedural rules, and are ill-equipped to investigate and prepare their claims, utilize rights to offer documentary evidence, present causes at hearings, exercise appellate rights, and exhaust administrative remedies. (JA 144-45, 170-71, 193-94, 386, 392-93, 434; R 66 Siem. Decl. ¶4, R 141 Demp. Decl. ¶7). Unrepresented veterans encounter great difficulties in prosecuting SCDD claims. (*E.g.*, R 74 Ex. 102). An experienced BVA attorney observed: "[P]eople that don't have representation . . . generally don't have the wherewithal on how to develop their claim . . . . How are they going to know VA procedure? They many times don't really get all their medical records, service medical records. I don't think they do as well generally when they represent themselves." (R 149 at 18). A VA rating board member conceded:

> [I]n a number of cases . . . the veterans would be better off having attorneys represent them . . . . [T]here are some cases that are denied because all the evidence hasn't been obtained, and other cases I think are denied because some rating specialists misinterpret the law . . . [A]n attorney can argue the law much better than a lay person. Of course, an attorney could amass a much better brief of the facts than a lay person could.

(JA 255, 257).

VA attorneys actively participate in every aspect of the adjudication of claims. (JA 435). Over 800 VA staff attorneys decide claims, prepare ratings and SOCs, draft BVA opinions, and perform various other functions in the adjudication process. (JA 254, 281-82, 294-95, 331-33, 435; R 46 at 25, 26; R 149 at 12-15, 51-52, 69-71). Yet 98% of BVA appellants are not represented

by attorneys. (*See* JA 587). Lay "service representatives" from organizations such as the American Legion and the Veterans of Foreign Wars handle 87% of perfected appeals under powers of attorney, while 11% of appealing veterans appear *in pro per*. (JA 574). VA regional offices, where the vast majority of VA claims are resolved, do not maintain representation statistics, but representation by attorneys is "not common at all." (JA 381; *see also* JA 255). Veterans frequently represent themselves at the regional office level (JA 254, 417). Applications for the $10 contingency fee are virtually non-existent, and the district court found that the fee limitation effectively "eliminates" veterans' ability to hire private counsel. (Op. 22a; *see also* JA 398).

The problems attributable to the fee limitation have been exacerbated by the recent emergence of complex SCDD claims, including: (1) claims by veterans exposed to radiation during atomic bomb tests or to toxic defoliants such as Agent Orange; and (2) claims for post-traumatic stress disorder ("PTSD"), first recognized as a disabling condition by VA in 1980. (JA 243-46, 277-78, 280, 289-90, 610-21; R 149 at 31-32, 73-76; R 157 at 129). VA acknowledged that legal representation is most acutely needed in cases "turning on judgment" such as PTSD and Agent Orange claims. (JA 382-83).

> Many of the claims being adjudicated by the Veterans' Administration today, such as claims involving atomic radiation, Agent Orange, and Post-Traumatic Stress Syndrome, involve more legal and procedural complexities than do many judicially litigated matters . . . issues such as causation, burden of proof, administrative presumptions, and statutory time limits render many veterans incapable of adequately presenting a claim to the Veterans Administration.

(JA 170). "Veterans' claims involve increasingly technical matters of scientific proof, medical causation and multiple etiology." (JA 185; *see also* JA 382-83, 462; R 78 Ex. 19 at 172). "[U]se of experts, doctors, and treatises may be crucial to development and proof of these more recent claims." (Op. 32a; R 66 Miles Decl. ¶5; *see also* JA 383-84, 452, 466; R 157 at 50; R 161 at 536-37, 541-42).

The fee limitation contributes to minuscule success rates in complex claims. None of the more than 16,000 Agent Orange SCDD claims has been granted. (JA 384-85, 465-66, 509, 520). Similarly, only fourteen of 2,067 atomic veteran claims have been granted, each of which was initially denied. (JA 383, 462, 466, 515). In contrast, veterans' civilian counterparts, who have access to counsel, have been more successful despite the more stringent burden of proof. *See In re Agent Orange Product Liability Litigation*, MDL 381 (E.D.N.Y. filed Feb. 23, 1979) (Vietnam veterans and families recovered $180 million in settlement of Agent Orange class action); *Allen v. United States*, 588 F. Supp. 247 (D. Utah 1984) (ten downwind civilian victims of atomic tests with leukemia or cancer recovered $2.7 million).

Veterans must depend largely upon lay representatives from service organizations to counsel them concerning their legal rights, prepare and substantiate their claims, and conduct evidentiary hearings. "Almost none" of the service representatives are attorneys (Op. 36a), and none receives any formal training from the VA. Nor does VA attempt to assure their competence as representatives: "Now, the Veterans Administration must accredit each service officer who appears on a regular basis to present claims. But most of this accreditation, as I understand it, goes to good character and that kind of thing, rather than as such competence." (JA 369). Moreover, the VA Director of Compensation and Pension Service admitted that local service representatives "have limited ability, and some of them . . . might even be a volunteer or they're working for the county." (JA 478). Service representatives owe veterans none of the ethical duties and obligations that attorneys owe clients, and may withdraw their representation at any time without explanation. (JA 122).

VA persists in characterizing service officers as "effective," "adequate," "expert," and "skilled." (BFA 16, 17, 26, 30). Yet the district court found that service representatives, however well-intentioned, lack the skills, money, and resources to represent veterans adequately, especially in complex claims. (Op. 32a, 33a, 36-38a). The district court expressly found that service representatives provide "scant" representation compared to attorneys due to lack of legal training, insufficient resources, failure to conduct factual investigation, poor briefing, and lack of

oral advocacy. (Op. 36a-38a).[4] These problems are even more pronounced in complex SCDD claims. (JA 127, 143, 149, 180, 182). These shortcomings were documented below in numerous examples drawn from appellees' own claims as well as from a random sample of SCDD claim files selected by VA. (JA 610-24). The district court found that "[s]ervice representatives rarely gather or develop either expert testimony or documentary evidence on their own to support the applicant's claim." (Op. 36a). "[I]n almost all cases, the record will consist of the claimant's service history and his service medical history." (*Id.* quoting JA 347). Frequently, veterans "represented" by service representatives prepare their own claims.[5] Service representatives often commit fundamental legal or tactical errors in preparing claims, drafting briefs, and conducting direct examination. (JA 171, 349, 390, 397, 452, 474-75, 623; R 66 Caron Decl. ¶7; R 66 Miles Decl. ¶5; R 66 Tur. Decl. ¶5; R 70 Ex. 172; R 76 Exs. 158, 162; R 149 at 17, 33, 60-61; R 151 at 177-86). The typical SA prepared by a service representative (which must detail every disagreement with the SOC), fails to dispute the factual contentions contained in the SOC, rendering the appeal subject to summary dismissal. 38 C.F.R. § 19.126. (JA 343, 394). Service representatives "seldom" raise questions of law upon appeal, resulting in waivers of any errors of law. (JA 344, 365). The district court found: "When claimants do appear before the BVA

[4] Appellees' criticism of the services provided by service organizations explains the participation of the Disabled American Veterans as the lone *amicus curiae* for appellants herein. (DAV Br. at 3, 15). DAV appears to be alone among over 30 service organizations in its support for the fee limitation. For example, in Resolution No. 744, adopted in 1984, the Veterans of Foreign Wars expressed its support for elimination of the fee limitation. Similarly, the American Legion opposes the fee limitation, as do Swords, Vietnam Veterans of America, the American Veterans Committee, Jewish War Veterans of America, and many other VA service organizations.

[5] (JA 182, 188, 197, 217, 262, 297-99, 359-66, 384-85, 391-93, 399, 413, 417-20, 424-29, 456-57, 469, 472-73, 475, 478-81, 607, 608, 611, 613-15, 617-18, 622-24; R 66 Tur. Decl. ¶5; R 70 Exs. 172 at 17-19, 175; R 145 at 69, 93; R 151 at 151-54; *see also* JA 131-32; R 149 at 17, 60-61; R 151 at 177-86).

in a hearing, the first time they meet with the service representative . . . is usually just thirty minutes before the hearing." (Op. 37a).[6] At hearings, service representatives commonly do not pose questions. Instead, the district court found that they frequently rely upon rating board members to ask questions, despite the fact that the rating board may elicit responses that later are relied upon to deny a claim. (Op. at 37a; JA 133-34, 357, 432; *e.g.*, R 76 Exs. 158, 162). The district court found that

> the written memos produced by service representatives also suffer. Even in presenting a claimant's final appeal to the BVA, it is standard practice for service organization representatives to submit a one to two page handwritten brief. This rarely cites to authority, and in fact is frequently written by the claimant himself rather than by the representative.

(Op. 36a-37a). A BVA attorney adviser admitted:

> I'm disappointed with the American Legion's performance. . . . I told their national adjutant . . . that I felt many, many times their cases at the Board of Appeals level were not properly developed. In fact, they have a xerox, a form which they just type their name in, meaning the American Legion representative, ask that reasonable doubt be applied in the favor of the veteran and then they sign their name. And I don't consider that appropriate development, particularly in some cases where there is a need for development. It would make a difference in making allowance or denial . . . .

(R 149 at 17).

The district court found that service "representative[s] [do not] make up for these written inadequacies through oral advocacy. The vast majority of BVA hearings are handled merely

[6] (JA 127, 143-44, 149, 180, 182, 189, 197-98, 217, 346, 394, 599). In addition, the district court found that overwhelming case loads exacerbate the problem. (Op. 36a). In FY 1982, twelve to fourteen national service officers handled about 95% of the 1,328 central office hearings, or nearly 100 each. In addition, these officers handled a similar percentage of appeals in which hearings were waived, estimated to amount to more than 2,000 appeals per officer. (JA 366). "[T]he case loads of the national level staff appear to be crushing—about 5 cases to present per working day. It is difficult to conceive how effective representation can be provided for that number of cases." (JA 547; *see also* JA 255-57; R 149 at 33).

through the submission of an 'informal hearing memorandum,' and in these cases the claimant never meets with his representative." (Op. 37a). These memoranda typically consist of two pages or less, rarely cite authority, and supplant a live hearing. (Op. 36a-37a; JA 346-47, 349; *see also* JA 600-01). The following service representative's statement, designed to "allow the representative to clarify any points in contention or elaborate on them before the final referral" to the BVA, is typical of those prepared by service representatives. (JA 349; R 143 at 224-25; R 160 at 486-94). It states in its entirety: "The veteran appeals for service connection for sciatic nerve damage which he contends was caused by injections after contamination by atomic fallout. He believes his arthritis is of many years standing and had its inception during service. The third part of the appeal is for an increased evaluation of his Duodenal ulcer." (JA 44, 148; *see also* JA 606; R 76 Ex. 156).

III. THE ADVERSE CONSEQUENCES OF THE FEE LIMITATION ARE WELL DOCUMENTED IN THE RECORD

The district court concluded that the complexity of VA rules, practices, and procedures, the absence of legal representation, and the shortcomings of lay service representatives combine to discourage claimants from exercising procedural rights and cause many SCDD claimants to abandon their claims or appeals. (Op. 30a-31a; *see also* JA 141, 144-45, 147-48, 180, 182, 199-200, 324-25; R 67 Bit. Aff. ¶4; R 149 at 49-50). Furthermore, many potential SCDD claimants fail to file claims in the first place because they are unable to retain attorneys to represent them. "Many veterans chose not to go forward because [they are not] able to hire counsel." (JA 129; *see also* JA 155; R 67 Udall Aff. ¶¶1-3). VA admitted that "lots of claimants are frustrated with the process . . . and have given up on the system." (JA 334; *see also* JA 325; R 161 at 559-63).

The district court found, based upon uncontroverted evidence, that many claims are "abandoned" unknowingly. (Op. 30a-31a). Debilitative diseases often prevent veterans from investigating and pursuing valid claims or cause them to abandon their claims. (JA 144, 148). Furthermore, the district court found that inadvertent failures to comply with VA procedural requirements

result in claim denials. (Op. 30a-31a; *see also* JA 413-15, 485-86; R 66 Gret. Decl. ¶¶5, 6; R 67 Stav. Aff. ¶5). The claim is automatically denied without notice to the claimant by means of a "record purpose disallowance" upon expiration of the applicable response deadline. (JA 313-14, 449-50; R 77 Ex. 17 at 116-17). "This occurs quite frequently where someone is advised by us that they must produce certain evidence and they don't respond to the letter. We make a record purpose disallowance. The claim is considered abandoned a year from the date of our request." (JA 413). The veteran may labor indefinitely under the misimpression that his or her claim is still pending. (JA 46, 449-50). "We don't notify them that the decision is final without some inquiry." (JA 415). Significantly, "[t]hey're unaware of the record purpose disallowance, so there's no opportunity to appeal." (JA 414). An untimely SA means that, absent a rare finding of clear and unmistakable error, the merits of an appeal are never reached. (JA 387, 430-31; R 66 Gret. Decl. ¶5; R 77 Ex 17 at 141). The record purpose disallowance entails a forfeiture of accrued or retroactive benefits if the claim is ever reopened. (JA 414); 38 C.F.R. § 3.158(a). An overwhelming percentage of disallowances are "record purpose" disallowances, and few abandoned claims involve formal withdrawals. (JA 485, 590-97).

Although claimants who exercise the right to a hearing are almost twice as apt to prevail, few veterans actually request hearings. (JA 224, 254, 259, 278-79, 281, 295-96, 334, 335, 339-40, 416-17, 525, 527; R 67 Bit. Aff. ¶ 4; R 154 at 215-17; R 155 at 161). Only 12,196 regional office hearings were held nationally in FY 1982 out of 1,030,884 total actions taken, an incidence of but 1.2%. (R 74 Ex. 98 at 3; R 154 at 216). Appellate trends are just as pronounced. "[P]ersonal hearings comprise a very small part of the Board [BVA] workload." (R 156 at 268). "Of more than 34,000 cases decided by the BVA in FY 1978, only 1,452 involved personal appearance[s]." (JA 562; *see also* JA 602-05). Service representatives often fail to exercise the veteran's right to obtain a personal hearing, and generally only request hearings "where the claimant insists on it or where they think the decision is particularly outrageous in light of the evidence of record." (JA 259). In contrast, "attorneys do like to have hearings and go

eyeball to eyeball and flush it out." (JA 295). Furthermore, a substantial number of veterans neglect to request a hearing transcript, although one is always prepared for VA's own use. (R 46 at 24; R 143 at 250; R 159 at 411-14). Veterans rarely exercise their right to review their claim files, and the few veterans who do schedule hearings "fairly commonly" do not appear. (JA 379; R 143 at 253). Even in the few instances where veterans exercise the right to a hearing, documentary evidence is rarely submitted, expert testimony is infrequently offered, and normally the claimant alone testifies. The average VA hearing lasts a mere 39.5 minutes. (JA 357, 573; R 156 at 267).

Similarly, the vast majority of unsuccessful claimants do not exercise their right to appeal, despite the fact that the mere filing of a NOD (notice of appeal) prompts regional offices to summarily reverse 14% of initial denials. (R 158 at 351). For example, only 1,954 of the roughly 250,000 appealable Northern California region decisions (.9%) resulted in NODs (notices of appeal) in FY 1982. (JA 387; *see also* JA 308-10, 324-25). Moreover, the appeal abandonment rate between the NOD and SA stages alone ranges from 25.6% to 34.8%. (R 46 at 22). Significantly, the vast majority of "abandoned" appeals involve inaction by a veteran rather than deliberate action. (JA 485-86, 590-97). For example, in the first part of 1983, 81.1% of Northern California region claims in which an appeal was instituted by filing a NOD were "closed" due to the veteran's failure to file a timely SA; fewer than 1% were formally withdrawn. (JA 485, 596). The VA acknowledged that "quite a few" unrepresented claimants become "extremely frustrated" after an initial denial and give up. (JA 485-86). In contrast, attorneys almost uniformly follow through on claims to their completion and do a "good job." (JA 460; *see also* JA 432-33; R 180 Ram Supp. Decl.).[7] "I'm sure an

[7]VA totally disregards the district court's express finding that available statistics regarding BVA attorney-agent/service representative success rates were not meaningful. (Op. 27a). "Not only may paid attorneys be able to devote more time and resources to the cases, but they may also develop substantial expertise in the complicated legal areas involved with SCDD claims. Currently, the few attorneys who take SCDD cases generally do so on a one-time basis." (*Id.* (citations omitted); *see also* JA [illegible]). The district court's finding is not clearly erroneous, especially as attorney/service representative success rates from discharge upgrade proceedings, which are not subject to the fee limitation, show that veterans represented by private counsel had the highest success rate—over 72%. (Op. 27a; JA 548, 569). By comparison, claimants represented by service organizations had a 48% success rate. (JA 569).

attorney who's got a strong interest in a case will pursue it and inquire as to what our procedures are and see that we followed them." (JA 382). BVA reverses or remands more than a quarter of the few perfected appeals, and VA has predicted a significantly higher reversal rate were judicial review of VA decisions allowed. (R 75 Ex. 114 at 31-33). It follows that a large number of abandoned claims would have resulted in compensation had the claimants been represented by counsel, who would have followed through with the claims or appeals.

The district court found that the absence of legal representation leaves veterans vulnerable to administrative errors and sharp practices, as actual VA practices often diverge markedly from regulatory requirements. (Op. 35a). For example, the regulation that guarantees claimants a right to a hearing "at any time on any issue," 38 C.F.R. § 3.103(c), which VA acknowledged is an "integral part" of due process (JA 401), was jettisoned by VA in an adjudication memorandum:

> Although VAR 1103 permits a hearing anytime on any issue, we do not have the resources to operate in this way. Hearings should *follow* the Statement of the Case. Hearings are not to be scheduled before the SOC in all but the most unusual cases. We can always explain why a hearing is not appropriate at a particular stage in processing. In cases previously disallowed, the hearing process must be discouraged as a means of presenting new and material evidence. . . . I know you are aware of these points but the appellant isn't. To effect this change in policy, employees will obtain the initials of a Section Chief on all requests to 21 to schedule a hearing.

(JA 401-11, 512-13). Indeed, VA's long-standing "unofficial" policy has been to ignore 38 C.F.R. § 3.103(c), and honor hearing requests only *after* a decision has been rendered, a NOD filed, and a SOC prepared. (JA 247-49, 259-60, 401-11, 512-13).

"Your request for a hearing will be considered at a later date. We do not normally grant hearings before the original decision is made. If this decision is not favorable to you, you will have an opportunity to file a Notice of Disagreement and initiate an appeal. Hearings are offered as part of the appeal process." (JA 514). Thus, VA denies unrepresented veterans hearings before decisions are made—the most meaningful stage in the adjudication of claims. (JA 379-80, 403-04, 436, 439-40, 448). Because few claims proceed as far as a NOD, the impact upon the 99% of claimants who do not perfect appeals is considerable. Moreover, the few claimants who exercise their truncated post-decisional "right" to a hearing bear the added burden of persuading the rating board to change its mind. Significantly, a rating board member recalled but one instance in ten years in which a *post hoc* hearing persuaded him to change an initial decision. (JA 247-48, 251-52; R 148 at 42-43; *see also* JA 259).

The district court also found that unrepresented claimants are frequently targets of concerted efforts by VA officials to induce them to surrender important procedural rights, such as their right to a hearing. (Op. 35a; JA 88-89, 91, 93-94, 500-01, 507-08, 512-13, 526; R 72 Ex. 11; R 76 Ex. 163; R 78 Ex. 18 at 8; R 156 Ex. 83). VA admitted that its form or "pattern" letter sent to unrepresented claimants who request hearings contains these false or misleading statements: (1) written submissions are equivalent to live testimony; and (2) a hearing request would cause multiple delays before decision. (JA 91, 93-94, 380-81). VA's practice of coaxing waivers from unrepresented claimants is particularly important because the district court found that exercise of the right to a hearing is "crucial to a veteran's chance of success" and statistically improves a veteran's chance of success almost two-fold. (Op. 35a; *see also* R 53 at 3, 4). In the related area of military discharge upgrade proceedings, "[t]he chance of success improves markedly when the veteran personally appears before the Boards, a step most veterans are probably unwilling to take without representation." (Op. 27a; JA 544).

The district court expressly found that other aspects of the VA system do not compensate for the deprivation of counsel. (Op. 32a-38a). Indeed, VA's characterization of the claims process as non-adversarial and of VA's role as supportive contradict the

express findings of the district court. (*See* Op. 31a-36a).[8] The district court found that, in practice, VA pays little more than lip service to the regulation obligating it to assist veterans in developing the facts necessary to support their claims. (Op. 33a-35a). The "assistance" rendered by VA is invariably limited to seeking service and medical records. (Op. 36a; JA 347). "[I]t's up to the claimant first, yes. . . . [T]he primary responsibility is for the claimant to try to develop the information and the documentation to establish his claim. And then we are secondarily responsible in certain areas." (JA 471). For example, the district court found that VA makes no effort to cross-reference atomic radiation claims to detect patterns of exposure or disease or to interview, locate, or even identify witnesses possessing pertinent information concerning a claim. (Op. 34a-35a). "Ordinarily the burden of that falls to the veteran." (JA 277, 312, 355-57, 371, 385,471-72; R 153 at 78; R 158 at 313; R 160 at 480-81; *see also* JA 198; *see generally* R 148 Ex. 187). "We really wouldn't know where to begin to look . . . ." (JA 415). Likewise, the district court found that, "even where the relevant information . . . lies particularly within the control of the VA, it does not make the necessary effort to obtain that information." (Op. 34a).

Moreover, the district court found that VA rarely utilizes other available sources to aid it in assuring the accuracy of its more complex determinations. (Op. 34a). For example, the

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[8] The district court also observed: "The dual dictate of 38 C.F.R. § 3.103(a) (1983), which requires VA personnel to provide claimants with 'every benefit that can be supported in law while protecting the interests of the Government,' also raises a question as to the extent to which it is possible to serve the interests of both the VA and claimants simultaneously. Clearly, the financial interests of these two parties may often conflict, and it is not inconceivable that VA personnel might feel some pressure to protect the government purse." (Op. 33a n.17). Faithful performance of each of the VA's conflicting roles—promulgator of rules and regulations, decision-maker, guardian of government's purse strings, and friend to veterans—is impossible. The true, adversarial nature of the relationship between VA and SCDD claimants is emphasized by attorneys familiar with the VA and claimants alike. (JA 149, 159, 172, 179, 199, 217; R 66 Siem. Decl. ¶4; R 66 Miles Decl. ¶6; R 66 Caron. Decl. ¶¶8-9; R 66 Stav. Aff. ¶9; R 67 Bit. Aff. ¶4; *see also* JA 327-28, 357, 401-13).

Northern California Regional Office has never requested an expert medical opinion on causation or exposure respecting any atomic veteran claim it has adjudicated. (Op. 34a; JA 252, 271, 372, 397-98; R 143 at 231; R 157 at 51-52). Indeed, VA requested only 202 advisory medical opinions nationwide in FY 1982, or roughly one for every 10,000 claims it adjudicated. (JA 559; R 86 Der. Aff. ¶2). In addition, unpublished VA directives forbid adjudicators from exploring many promising sources of pertinent documents, such as other government agencies. (JA 354, 415-16, 481-485; R 143 at 149-51; R 156 at 238; R 157 at 20-23, 98-102; *see also* R 72 Ex. 12 at 33-36; R 156 Ex. 84). "I can't understand the rationale behind it. I still think we should be permitted to develop relevant, persuasive evidence wherever it is." (JA 483). Investigative shortcomings are also common in more prosaic SCDD claims. (R 67 Bit. Aff. ¶3).[9] For example, the district court found that VA rarely invoke its statutory power to obtain documents in support of a claim; VA has issued only five subpoenas since 1976, most of which sought proof of claimant fraud. (Op. at 35a). Unfortunately, a veteran "is generally unable to discover or obtain government documents." (JA 172; *see also* JA 216-17; R 66 Miles Decl. ¶6; *cf.* R 143 at 255).

By VA's own admission, erroneous deprivation of SCDD is frequent, as are procedural irregularities. (JA 233, 256, 289, 477;

[9] The district court found that the VA's meager development of facts stems in part from its personnel policies and productivity measures. (Op. 33a). The Northern California region, for example, employs seventy-six claims examiners and clerks to handle approximately 62,000 claims (816 claims per employee annually), who collectively are allotted only 2.84 hours to develop, process, and decide an initial SCDD claim. (Op. 33a; JA 238-40, 246-47, 279, 374-75, 387-89, 510; *see also* R 157 at 8-13). Time credits are even more modest for deciding reopened claims or appeals, and no credit is given for responding to claimant correspondence. (JA 373-75, 443-46; *see also* R 70 Exs. 167-75). Employee performance is assessed based in part upon average claim handling time, a system which encourages claims examiners to process claims expeditiously. (JA 388-89, 446). "[I]t is ludicrous to have such production standards. But they exist, and there is nothing I can do about it, so I live within the system." (JA 279-80).

R 66 Siem. Decl. ¶3; R 72 Ex. 10 at 12-15; R 74 Exs. 98, 100; R 76 Ex. 160; R 152 at 261-63; R 155 at 68-80, 133; R 157 at 46). This admission is supported by the claim files of the individual appellees and by a series of claim files randomly selected by VA and produced in discovery. (R 145 Exs. 177-82; R 152 Ex. 194; R 158 Ex. 87 *passim*). "The rating process is done by human beings and errors exist. And many things are matters of judgment." (JA 256; *see also* JA 289-90). The district court found that the fee limitation, judged in the context of VA's current adjudication rules, procedures, and practices, creates a "high risk of erroneous deprivation,"[10] and "deprives [appellees] of the ability to make a full presentation of their claim[s] to the VA." (Op. 22a-38a). In addition, the district court found that the

[10] Due in large measure to the prohibition against judicial review of VA decisions, courts rarely obtain a glimpse of this fact. *See generally* Goldhammer, *Veterans Disability Benefits: The Last Sad Stronghold of Untrammelled Administrative Discretion*, 8 Bev. Hills B.J. 33 (1974). However, recent decisions involving the VA's recoupment and set-off programs illustrate the adversarial nature of the claims process, the VA's frequently strained interpretation of statutes, and the problems experienced by unrepresented VA claimants. In *deMagno v. United States*, 636 F.2d 714 (D.C. Cir. 1980), the court stated: "We have read and reread the administrative record and the briefs of the parties, and confess ourselves mystified at the action taken by the VA in this case. Either the VA is withholding, both from us and deMagno, *all* evidence which would justify its conduct, or this woman has been the victim of wholly arbitrary administrative ineptitude, leaving her impoverished for nearly four years." 636 F.2d at 716 (emphasis in original). Similarly, in *United States v. Brandon*, 584 F. Supp. 803 (W.D.N.C. 1984), the court decried the problems encountered by unrepresented veterans in defending recoupment attempts by the VA: "The impression that the VA may be thus oppressively implementing the [recoupment] law is especially disturbing in light of the large number of recent suits filed by the United States against veterans. . . . [A]lmost half of the civil cases filed in this division the first half of 1983 were suits of that nature. Generally, the amounts sought by the government are less than $1,000 . . . . *The court is not aware of any case in which the veteran has been represented by a lawyer.* This is the first such case before this judge in which a veteran has contested, in court, the liability alleged by the United States." 584 F. Supp. at 807 (emphasis added).

"complexity of the substance and procedures involved . . . , as well as the importance of the interest at stake . . . give rise to a need for representation" of constitutional dimensions. (Op. 38a).

SUMMARY OF ARGUMENT

VA's appeal depends upon a series of inconsistent arguments. First, VA seeks to avoid the abuse of discretion standard of review applicable to preliminary injunctions by claiming the district court committed "decisive" legal error. (BFA 23). Yet nowhere does VA defer to the district court's express findings of fact or even argue they are "clearly" erroneous.[11] Indeed, VA disclaims any obligation even to discuss the record before the district court and its brief is devoid of citation to the voluminous record below. (BFA 16, 22). Rather, VA repeatedly refers to "facts" not of record, which in many instances are wholly inconsistent with uncontroverted facts below and express findings of the district court.[12] Finally, in framing its argument of

[11] Federal Rule of Civil Procedure 52(a) provides in pertinent part: "[I]n granting or refusing interlocutory injunctions the court shall . . . set forth the findings of fact and conclusions of law which constitute the grounds of its action . . . . Findings of fact shall not be set aside unless clearly erroneous . . . ." A finding of fact is not clearly erroneous unless "the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1941) (emphasis added). "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent. [Citations omitted.] We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.' " *United States v. National Association of Real Estate Boards*, 339 U.S. 485, 495-96 (1950). While VA claims the district court applied an incorrect legal standard (BFA 15, 23), it does not dispute the well-established due process and First Amendment principles applied by the district court. Rather, it quarrels only with the district court's ability to receive evidence and its findings of fact.

[12] Rather than citing the record, VA cites hearsay from unsworn, conclusory statements by its own officials before Congress (BFA at 29, 40), and artfully edited excerpts from committee reports regarding bills that died in committee. (BFA 9-10, 29, 40-43). These materials were not presented to the district court and therefore should not be considered by this Court. *See Economic Development Corp. v. Model Cities Agency*, 519 F.2d 740, 744 (8th Cir. 1975) (appellate court ruling on propriety of preliminary injunction must base its review on the record presented to the trial court); *Russell v. Cunningham*, 233 F.2d 806, 809 (9th Cir. 1956) (appellate court is confined to district court record in determining whether findings were clearly erroneous). Moreover, VA argues that the facts of record below were virtually identical to the facts presented to Congress, while simultaneously relying upon legislative "statements" inconsistent with the record below. In fact, VA's selective rendition of legislative "facts" is inconsistent with the district court's findings and the uncontroverted facts adduced below. In stark contrast to the specific factual findings of the district court based upon deposition testimony of key VA officials, actual claims and affidavits from individuals intimately acquainted with the adjudicative process, VA's selective rendition from legislative events is vague and conclusory.

legal error, VA abandons its argument that appellees do not possess a property interest in SCDD (BFA 46 n.49), which is largely a legal question. Instead, VA focuses upon the second stage in due process analysis, the balancing of interests, which is inextricably tied to the particular facts of record and, therefore, peculiarly invokes the district court's discretion. In sum, VA asks the Court to find "legal error" by disregarding the record, substituting "facts" not of record, and treating appellees' as-applied challenges as merely facial.

VA has failed to demonstrate that the district court abused its discretion in granting the preliminary injunction. The district court properly determined that appellees were likely to prevail on the merits of their claim that they have a constitutional right to retain attorneys at their own expense unhampered by the $10 fee limitation. Unlike applicants who in the past brought purely facial due process challenges to the fee limitation, appellees documented the adverse effects of the fee limitation on the initiation, development, prosecution, and success of their SCDD claims. The fee limitation discourages the filing of SCDD claims, contributes to minuscule success rates in complex claims, prevents the utilization of fundamental procedural rights (often as a consequence of waivers solicited by VA), results in the abandonment of large numbers of SCDD claims, and retards correction of the frequent substantive and procedural errors VA makes in

adjudicating claims. Combined, these characteristics of the VA system cause a high risk of erroneous deprivation of SCDD, upon which many appellees or their survivors depend for the necessities of life. (Op. 21a-38a). These same facts demonstrate that the fee limitation deprives appellees of their First Amendment right to meaningful access to the VA adjudication system, the sole avenue by which veterans or their survivors may obtain redress for service-connected deaths and disabilities. These facts were completely unrebutted by VA below. Consequently, VA is precluded from contending that the district court's factual findings were clearly erroneous.

VA argues that the abuse of discretion standard of review ought to be discarded, noting the voluminous record below, the very record it has elsewhere spurned. (BFA 16, 22). Yet there is no authority for applying anything but the abuse of discretion standard.[13] Similarly, VA also disregards two of the three preliminary injunction factors—the likelihood of irreparable injury and the balance of hardships. Thus, VA has conceded that the district court did not abuse its discretion in finding that appellees would suffer irreparable injury absent a preliminary

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[13] The Court has uniformly applied the abuse of discretion standard to review of preliminary injunctions. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32, 934 (1975) ("[W]hile the standard to be applied by the district court in deciding whether a plaintiff is entitled to a preliminary injunction is stringent, the standard of appellate review is simply whether the issuance of the injunction, in light of the applicable standard, constituted an abuse of discretion .... [W]e cannot conclude that the District Court abused its discretion by granting preliminary injunctive relief. This is the extent of our appellate inquiry."); *Brown v. Chote*, 411 U.S. 452, 457 (1973) ("In reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion."). VA suggests that the abuse of discretion standard is inapplicable because the preliminary injunction may be in effect for up to a year pending trial and because the record below was extensive. All preliminary injunctions are in effect pending trial. Notably, VA has made no effort in the district court to advance this case to trial since the preliminary injunction was issued. Furthermore, the Court has never suggested that the anticipated date of trial or size of the record should make any difference in the standard of review.

injunction and that the balance of hardships weighed heavily in favor of appellees. (Op. 48a-51a).

Finally, VA urges the Court to ignore the record below and defer to legislative "determinations" that were not presented to the district court. (BFA 16). This argument was not even raised below, and should not be considered by this Court. Furthermore, the abject deference sought by VA is inappropriate here because: (1) Congress never made findings of fact in enacting or reenacting the fee limitation and never intended the fee limitation to harm veterans or restrict their rights; (2) VA's unsworn, conclusory statements of VA officials and artfully edited conclusory excerpts from Senate committee reports about bills that died in House committee are not Congressional findings and are not the proper subjects of judicial deference; and (3) appellees' claims involve procedural due process and the right to petition, and the abject deference sought by VA would require the Court to abdicate its responsibility to determine what procedures the Constitution requires concerning property interests created by Congress.

ARGUMENT

I. THE FEE LIMITATION DEPRIVES APPELLEES OF DUE PROCESS

A. VA Has Conceded That Appellees Possess a Property Interest

VA abandons the contention, advanced in the district court and highlighted in the Jurisdictional Statement, that veterans do not possess a Fifth Amendment property interest in SCDD. VA admits that SCDD recipients have a property interest, and "do[es] not press" its argument concerning applicants. (BFA 46 n.49). Thus, VA does not seriously dispute that the district court properly concluded that SCDD applicants and recipients possess a property interest in SCDD. (Op. 15a-19a). Appellees therefore simply refer the Court to the extensive analysis and citations in the district court's opinion. (Op. 15a-19a).[14]

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[14] *See Daniels v. Woodbury County, Iowa*, 742 F.2d 1128, 1132-33 (8th Cir. 1984) (state general assistance applicant has property interest); *Ressler v. Pierce*, 692 F.2d 1212, 1214-16 (9th Cir. 1982) (applicants for subsidized housing have a property interest because of standards determining eligibility); *Kelly v. Railroad Retirement*

B. Due Process Requires that Appellees Be Permitted to Retain Counsel Unhampered By the $10.00 Fee Limitation

VA bases this appeal largely on the due process stage that is inextricably intertwined with the facts—the determination of wha. process is due disabled veterans.[15] (BFA 25). Yet, VA

Board, 625 F.2d 486, 489 (3d Cir. 1980) (disability compensation applicants under Railroad Retirement Act have a property interest); *Griffeth v. Detrich*, 603 F.2d 118, 121 (9th Cir. 1979), *cert. denied*, 445 U.S. 970 (1980) ("authorizing statute coupled with the implementing regulations of the county creates a legitimate claim of entitlement and expectancy of benefits in persons who claimed to meet the eligibility requirements for general relief"); *Wrigh' v. Califano*, 587 F.2d 345, 354 (7th Cir. 1978) ("denials [of Social Security benefits] do not necessarily deserve less due process than terminations" (citation omitted)); *Davis v. United States*, 415 F. Supp. 1086, 1090-91 (D. Kan. 1976) (inmate applicant for prison disability benefits has property interest); *Shaw v. Weinberger*, 395 F. Supp. 268, 270 (W.D.N.C. 1975) (applicant for SSI has property interest); *Barnett v. Lindsay*, 319 F. Supp. 610, 612 (D. Utah 1970) (welfare applicants must be accorded due process in initial as well as terminal administrative proceedings); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 238-39 (1957) (due process applies to determination of eligibility for professional employment); *see also Devine v. Cleland*, 616 F.2d 1080, 1086 (9th Cir. 1980) (veterans receiving non-service connected educational benefits have property interest); *Plato v. Roudebush*, 397 F. Supp. 1295, 1308 (D. Md. 1975) (veterans receiving non-service connected pension benefits have property interest).

[15] To resolve this question, the Court must balance the interests of veterans in retaining a lawyer against the government's claimed interest in forbidding veterans from retaining attorneys. *See Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970). The Court has uniformly applied the following three-part test enunciated in *Mathews v. Eldridge*, 424 U.S. 319 (1976) in procedural due process cases: "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail". 424 U.S. at 335 (citation omitted). VA

premises its claim upon legal error while disregarding the district court's factual findings. Application of the *Mathews* test clearly shows that veterans have a right to retain counsel at their own expense.

1. Veterans have strong interests in obtaining SCDD and securing legal assistance

The district court expressly found that veterans' interest in obtaining SCDD was "extremely high" based upon uncontroverted evidence of record. (Op. 20a). Many recipients are totally or primarily dependent upon SCDD for their support. (JA 45-82, 199, 322-23). Service-connected injuries frequently interfere with or preclude employment of a veteran upon return to civilian life, while deaths often deprive a veteran's dependents of their principal or sole means of support. (JA 147, 199, 307-08, 378). SCDD claimants are frequently sick or disabled and many bring companions for physical assistance at regional office appearances. (JA 394-95). "[W]e have lots of people that . . . can't even afford a car or, they can't even have a driver's license any more." (JA 493; *see also* JA 542).

The district court further found that veterans have a compelling need for legal assistance in prosecuting SCDD claims. (Op. 38a). The veteran, who along with his or her service representative is usually a layperson, must confront VA adjudicators who, as noted above, usually have law degrees and are conversant with the VA's complex substantive and procedural rules. "Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries." *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 7 (1964) (citation omitted).

The complex VA rules and procedures, startling claim abandonment rates, pattern of overreaching concerning unrepresented claimants, pervasiveness of government attorneys, minuscule success rates, necessity for retaining and examining experts in complex claims, and other features of the adjudication

nowhere explains how a court could possibly perform this balancing process without an "evidentiary proceeding." (BFA 35 n.35).

process described above[16] make the right to retain an attorney a due process requirement.[17] Based on this evidence, the district court expressly found:

> Absent the fee restriction claimants would be able to hire attorneys to assist them in gathering medical and other documentary evidence, finding witnesses who could confirm

[16] VA argues that if the adjudication of claims is not operating as Congress intended, then Congress ought to correct these abuses directly. (BFA 19). This argument obscures the real constitutional issue—what need exists for attorneys given the VA system as it operates in fact?

[17] Indeed, there are but a few peculiar instances where the Court has denied individuals the right to retain counsel. These cases are readily distinguished by the settings involved and the interests at stake. First, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court held that prison inmates were not entitled to either retained or appointed counsel in prison disciplinary hearings. (The inmates were free, however, to consult with counsel outside the hearing room). The setting was that of a "closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." 418 U.S. at 561. The Court reasoned, "It is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society . . . to the very different situation presented by a disciplinary proceeding in a state prison." *Id.* at 560. The converse is equally true. *Baxter v. Palmigiano*, 425 U.S. 308, 315 (1976), insofar as it is pertinent here, merely reaffirmed the *Wolff* holding. There is no counterpart here to the exigencies of prison discipline which were so crucial to the holdings in *Wolff* and *Baxter*. Second, in *Goss v. Lopez*, 419 U.S. 565 (1975), the Court held that high school students threatened with suspensions of 10 days or less, while entitled to limited due process protections, need not be afforded an opportunity to secure counsel. This decision was based largely on the summary nature of the decision and the short duration of the suspensions. 419 U.S. at 582-84. The Court acknowledged that "longer suspensions or expulsions . . . may require more formal procedures." *Id.* at 584; *cf. Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (right to counsel at proceedings prior to expulsion). Clearly, veterans' interest in receiving SCDD, which may affect subsistence levels over a lifetime, is of far greater consequence than the ten-day school suspension involved in *Goss*.

> the claimants' version of events which transpired, obtaining expert testimony and reports, and presenting their evidence in a convincing fashion both on paper and in oral argument. Attorney representation is also more likely to ensure that veteran claimants comply with procedural rules and have their claims decided on the merits.

(Op. 38a). Recognition of veterans' right to retain attorneys would: (1) allow veterans to obtain legal advice about (a) existence of a valid claim, (b) the likelihood of success, and (c) VA's substantive and procedural rules, including complex factual and evidentiary requirements; (2) improve the investigation, preparation, and prosecution of SCDD claims; (3) insure veterans' utilization of fundamental procedural rights provided by law; (4) reduce the incidence of veterans' abandonment of valid claims; and (5) minimize the procedural and substantive errors and irregularities that characterize the adjudication of SCDD claims. In short, it would substantially increase the fairness of the VA adjudication system, reduce the risk of erroneous deprivation of SCDD, and allow the purpose of SCDD to be more effectively fulfilled.

As the Court stressed in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), "[O]ur decisions have emphasized time and again, [that] the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged." 455 U.S. at 433. Courts have consistently emphasized the need for representation by trained legal counsel in an administrative setting as a fundamental aspect of the right to be heard.[18] In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court

[18] The authorities VA relies upon to suggest the contrary are completely inapposite. (BFA 26). Neither *Parham v. J.R.*, 442 U.S. 584 (1979), nor *Schweiker v. McClure*, 456 U.S. 188 (1982), considered the right to counsel at all. Both cases dealt with the qualifications of hearing officers and held that, in the context of the voluntary commitment of children to mental hospitals by their parents (*Parham*) and Part B Medicare disputes (*Schweiker*), such hearing officers need not be lawyers or judges. The remaining cases dealt with the government's obligation to appoint counsel for indigents in a variety of administrative settings, and not with the issue of the right to retain counsel. *Lassiter v. Department of Social Services of Durham County, North Carolina*,

held that the Due Process Clause of the Fourteenth Amendment requires that, before public assistance payments can be terminated, a welfare recipient must be afforded an evidentiary hearing at which he or she is entitled to be represented by counsel. 397 U.S. at 268-71.[19] The Court emphasized the teaching of

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452 U.S. 18, 24 (1981) (appointment of counsel in proceedings to terminate parental rights to be determined on a case-by-case basis; retained counsel allowed); *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973) (appointment of counsel in probation revocation hearings to be decided on a case-by-case basis; issue of right to retained counsel not decided); *Middendorf v. Henry*, 425 U.S. 25, 42-48 (1976) (no right to appointed counsel in summary courts-martial given peculiar exigencies of the military community and the opportunity to accept special or general court-martial, where retained or appointed counsel was available); *Vitek v. Jones*, 445 U.S. 480, 496-97 (majority), 500 (Powell, J., concurring in part) (1980) (appointment of counsel for prisoner threatened with transfer to mental hospital allowed but not constitutionally mandated; appointment of "qualified and independent assistance" constitutionally mandated; retained counsel implicitly allowed). Indeed, nearly all of these cases implicitly or explicitly recognized the right to retained counsel, which is all that appellees seek.

[19] *See also Ressler v. Pierce*, 692 F.2d at 1219-22 (applicants for public housing having a right to be advised of local legal service organizations); *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1004 (4th Cir. 1970), *cert. denied*, 401 U.S. 1004 (1971) (public housing tenant facing eviction has a right to be represented by counsel); *Sartain v. Securities and Exchange Commission*, 601 F.2d 1366, 1375 (9th Cir. 1979) (right to counsel at hearings before SEC); *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973) (right to counsel at proceedings prior to expulsion from school); *Cleaver v. Wilcox*, 499 F.2d 940, 945 (9th Cir. 1974) (counsel required to be appointed for indigent parents in certain child custody proceedings); *Crook v. Baker*, 584 F. Supp. 1531, 1556, 1559-60 (E.D. Mich. 1984) (right to retain counsel recognized in proceeding to rescind college degree); *Ferguson v. Metropolitan Development and Housing Agency*, 485 F. Supp. 517, 528 (M.D. Tenn. 1980) (rental subsidy benefit recipients have right to obtain counsel); *Feinberg v. Federal Deposit Insurance Corp.*, 420 F. Supp. 109, 120 (D.D.C. 1976) (bank officer has right to retain counsel in post-suspension proceeding); *Davis v. United States*, 415 F. Supp. 1086, 1098 (inmate applicant for prison disability benefits has right to retain attorney); *Batchelder v. Kenton*, 383 F. Supp. 299, 302 (C.D. Cal. 1974) (inmate has right to retain counsel for parole date revocation hearing).

Powell v. Alabama, 287 U.S. 45, 68-69 (1932): "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 397 U.S. at 270. "Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." *Id.* at 270-71. The Court concluded that the Due Process Clause requires that the recipient "be allowed to retain an attorney if he so desires," notwithstanding the government's asserted interests in informality and processing speed. *Id.* at 267, 270. The Court noted: "We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." *Id.* at 271.

The lack of subsequent proceedings also points to the constitutional infirmities of the fee limitation. *See Boddie v. Connecticut* 401 U.S. 371, 378 (1971); *Mathews v. Eldridge*, 424 U.S. 319, 339, 349 (1976) (availability of post-termination hearings and judicial review before the denial of SSA disability benefits became final influenced Court's decision not to require pre-termination hearings). No similar subsequent protections ameliorate the impact of the fee limitation. The fee limitation applies at all stages of the administrative proceedings, and VA decisions are not subject to judicial review. 38 U.S.C. § 211(a). Moreover, veterans cannot sue under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*, for disabilities stemming from their military service, *Feres v. United States*, 340 U.S. 135 (1950). Thus, if VA denies a SCDD claim, a veteran has no recourse, and is condemned to a lifetime of uncompensated disability.

The arguments VA raises to support the fee limitation do not conform to the *Mathews* framework, and fail to address the district court's findings of fact. Contrary to VA's statement, unsupported by citation to the record (BFA 24), SCDD claims often involve complex legal determinations, as well as procedural questions involving interpretation of statutes and both formal and informal VA regulations. (*See supra n.3; see also* JA 290-93).

VA conceded that VA decisions involve complicated legal questions and emphasized these legal complexities below in justifying the VA's extensive legal staff. (JA 332, 632). Moreover, VA testimony below expressly contradicts VA's bald contention that credibility and demeanor play no significant role in SCDD decisions. (BFA 29). The highest ranking adjudication official for the Northern California region emphasized:

> [A hearing] allows the claimant to confront those decision-makers and show himself as an individual . . . . I think it injects a human note into the whole affair that otherwise would be reduced to an exchange of paper. And there are situations where just seeing the claimant, particularly in neuropsychiatric cases, just seeing the patient does more for the evaluation process than unending psychiatric reports.

(JA 379-80; *see also* JA 252, 448).

VA's argument that the "informality" of an adjudication process obviates the need for legal assistance or advice has been repeatedly rejected by the Court. For example, in *In re Gault*, 387 U.S. 1 (1967), the Court held that a juvenile subject to delinquency proceedings was entitled to retain counsel despite the informal, nonadversarial nature of the proceedings and the paternalistic interests of the state in tailoring the proceedings in accordance with its perception of the juvenile's best interests. 387 U.S. at 14-21, 25-31, 34-42. Like VA, Arizona emphasized that its "proceedings were not adversary," and that "juveniles obtain benefits from the special procedures applicable to them which more than offset the disadvantages" from lack of ordinary due process protections. *Id.* at 16, 21, 25-26, 35-36. The Court nevertheless looked beneath the surface of the legislation and "candidly appraised" the "claimed benefits of the juvenile process," *id.* at 22, concluding that juveniles had a due process right to retained (or, in the case of indigents, appointed) counsel. Again, in *Gagnon v. Scarpelli*, 411 U.S. 778, 786-87 (1973), the Court highlighted the value of attorney representation in the context of "informal" probation revocation proceedings:

> Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.

Despite abandoning its claim that appellees lack a property interest in SCDD, VA argues that a summary affirmance[20] in *Gendron v. Saxbe*, 389 F. Supp. 1303 (C.D. Cal.), *aff'd per curiam sub nom. Gendron v. Levi*, 423 U.S. 802 (1975), resolved the question of what process is due in VA claim proceedings.[21] (BFA 11). *Gendron*, however, is readily distinguishable. (*See* MA 22-25). *Gendron* involved a purely facial challenge—that the fee limitation should be declared unconstitutional without resort to evidence such as the characteristics of the disabled veteran population, the emergence of complex claims, the effects of the fee limitation upon the prosecution and success of claims and adjudication behavior, or the ability of service representatives to handle VA claims. No discovery was taken in *Gendron*,

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[20] The precedential significance of a summary affirmance must be assessed in the light of all facts. *Mandel v. Bradley*, 432 U.S. 173, 177 (1977). Furthermore, only questions adequately presented in the record are resolved by a summary affirmance. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979). Finally, summary affirmances "are not of the same precedential value as would be an opinion of this Court treating the question on the merits," and the Court is "less constrained by the principal of *stare decisis*" in dealing with "a constitutional question." *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

[21] VA admitted below that *Gendron* is "an anomaly in the law." (R 209 at 10). Significantly, VA also argued below that *Gendron* did not decide the question of what process is due. "Of course it is true that the *Gendron* Court never decided the specific question of what procedure was due in that instance." (R 82 at 5). Appellants now apparently contend that the *Gendron* Court reached the balancing stage. Even if the Court did reach the balancing stage, the analysis is different here because of the as-applied nature of appellees' claims and the fact that *Gendron* was decided upon a meager set of stipulated facts. VA also relies upon several other fee limitation cases, none of which are on point (BFA 18 n.17), as was recognized by the district court. (Op. 6a n.7). These cases mainly involve challenges by attorneys on equal protection, substantive due process, or freedom of association grounds. None involve an as-applied procedural due process challenge.

and the court acted on a brief set of stipulated facts. (MA App. G). By contrast, the instant case involves an as-applied due process attack based upon appellees' circumstances and current VA rules, practices, and procedures.[22] Unlike that of *Gendron*, the record here plainly documents the drastic effects of the fee limitation, including waivers of fundamental procedural rights such as the right to a hearing, abandoned claims, infinitesimal success rates in complex claims, forsaken appeals, uncorrected adjudication errors, and administrative misconduct *vis-a-vis* unrepresented claimants. This wealth of evidence was completely unrebutted below. Furthermore, the district court's findings concerning the ineffectual nature of the "representation" afforded by lay service representatives, almost none of whom are attorneys, are amply supported by the record below. (Op. 32a-33a, 36a-38a). Gendron did not even seek assistance from a service representative, and none of the stipulated facts addressed the adequacy or inadequacy of service representatives. (MA App. G). At the close of oral argument before the three-judge court, Gendron belatedly sought permission to submit testimony from a law student on the adequacy of representation, but his request was ruled untimely. (MA App. F). VA has now abandoned the claim made in its Jurisdictional Statement that *Gendron* raised this issue. (JS 13-14 n. 9). Consequently, none of the questions raised herein was adequately presented in the record in *Gendron*.[23]

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[22] "[A] statute, even if not void on its face, may be challenged because invalid as applied," *Whitney v. California*, 274 U.S. 357, 378 (1927), *overruled on other grounds, Brandenburg v. Ohio*, 395 U.S. 444 (1969) (citation omitted); and "[a] statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289 (1921); *see also Martinez v. Bynum*, 461 U.S. 321 n.10 (1983) ("We need not decide whether [the statute at hand] is unconstitutional as applied, for plaintiffs limited their complaint to a facial challenge of this statute"); *Zablocki v. Redhail*, 434 U.S. 374, 401 n. 2 (1978) (Powell, J., concurring) ("*Boddie* was an 'as applied' challenge; it does not require invalidation of [the statute at hand] as unconstitutional on its face").

[23] *Demarest v. United States*, 718 F.2d 964 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 2150 (1984), like *Gendron*, involved a facial challenge to the constitutionality of the fee limitation. The Ninth Circuit followed *Gendron* with little analysis or discussion. Demarest neither sought assistance from nor challenged the adequacy of the representation provided by service organizations. Moreover, Demarest took no discovery, and made no attempt to show the negative effects of the fee limitation upon the prosecution and adjudication of SCDD claims.

2. VA's interest in preserving the fee limitation is inconsequential

Below, VA did not assert any governmental interest in preserving the fee limitation. The district court found that "the government has failed to demonstrate that it would suffer any harm if the statutory fee limitation . . . were lifted." (Op. 39a). None of the VA "interests" VA now asserts was either argued below or is supported by the record. Thus, the Court should not entertain VA's arguments that elimination of the fee limitation would: (1) increase administrative costs or make claims processing more onerous (BFA 30); and (2) increase the formality and adversarial nature of VA proceedings. (BFA 20, 30-31).

Even if the Court chooses to hear VA's belated arguments, it should reject them. Although lawyers now represent veterans in 2% of VA claims, VA was unable to muster any evidence below that their participation in such claims increased average claim handling time, created any administrative difficulties, or damaged any government interest whatsoever. VA's argument that removal of the fee limitation would "alter the basic nature of the [adjudication] process" is also unpersuasive. (BFA 15). Appellees do not challenge VA's existing procedures, but merely seek legal assistance to understand and comply with VA's complex rules and procedures and to insure that they receive the statutory compensation they deserve. Removal of the fee limitation would in no way affect VA procedures, informal or not. Attorneys would represent veterans within the framework of the program and procedures Congress has established, just as they do now in approximately 2% of all claims. For the same reason, there is no credence to VA's suggestion that removal of the fee limitation would affect whatever procedural advantages veterans currently enjoy. (BFA 28). Likewise, there is no support in the record for DAV's argument that removal of the fee limitation would impair

the service organization network. Presumably, veterans would continue to use service representatives, whose services are free, whenever their interests justify it, and only resort to attorneys for complex claims or where they become disenchanted with service representation.

It is ironic that VA continues to press its paternalistic conception of veterans' interests in opposing a veterans' action attempting to establish the right to retain attorneys. VA cites overreaching by unscrupulous attorneys as one of its prime justifications for the fee limitation. (BFA 15, 32). It does so despite the fact that its own legislative "record" frankly states that this original rationale for the fee limitation "is no longer tenable." S. Rep. No. 97-466, 97th Cong., 2nd Sess. 50 (1982). A cruel irony, however, is that the overreaching and sharp practices that led Congress to enact the fee limitation in 1862 are now being committed by VA adjudicators against veterans. While overreaching by attorneys prompted the fee limitation in the unregulated professional environment of 1862, there is no reason to believe that state and local bar associations fail adequately to regulate the bar today.

VA's paternalistic depletion of benefits rationale is unpersuasive, especially with respect to complex SCDD claims, the success of which is most markedly prejudiced by the fee limitation. "[Y]ou're not depleting anything where there is no grant." (JA 389). Moreover, the district court found that "to the extent the paternalistic role is valid, there are less drastic means available to ensure that attorneys' fees do not deplete veterans' death and disability benefits." (Op. 39a-40a). Thus, the district court properly determined that the government's paternalistic justifications could be assigned no weight in the balance of interests. (Op. 49a-51a).

II. THE FEE LIMITATION VIOLATES APPELLEES' FIRST AMENDMENT RIGHTS OF PETITION, SPEECH AND ASSOCIATION

A. The Fee Limitation Deprives the Individual Appellees of Meaningful Access to the VA Adjudication System

The Court has recognized the "basic right to group legal action," holding that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the

protection of the First Amendment." *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-6 (1964); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 221-22 (1967); *NAACP v. Button*, 371 U.S. 415, 437 (1963).[24] The principle underlying these cases extends to individual efforts to obtain legal assistance. *Bates v. State Bar of Arizona*, 433 U.S. 350, 376 n.32 (1977). [25] Indeed, the Court vindicated the organizations' efforts precisely because they sought to aid their members: "Underlying [these cases] was the Court's concern that the aggrieved receive information regarding their legal rights and the means of effectuating them. This concern applies with at least as much force to aggrieved individuals as it does to groups." 433 U.S. at 376 n.32. Moreover, the right to petition protects individual efforts to obtain relief from administrative agencies as well as from courts. *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

The district court found that the fee limitation violates the individual appellee's First Amendment rights to obtain meaningful access to the VA adjudication system. (Op. 40a-48a). After concluding appellees need attorneys to help them prepare and present their SCDD claims to the VA (Op. 26a-38a), the district

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[24] The Court also has protected individuals' access to legal assistance and information in cases involving prisoners. For example, in *Bounds v. Smith*, 430 U.S. 817, 828 (1977), the Court held that states must protect the right of prisoners to meaningful access to the courts by providing law libraries or adequate assistance from legally trained persons. *See also Gilmore v. Lynch*, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd per curiam sub nom. Younger v. Gilmore*, 404 U.S. 15 (1971) (invalidating prison regulation severely limiting law books in prison libraries because it denies reasonable access to courts, and noting that right to such access "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary").

[25] *See also Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982), ("[W]hile private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights." (citations omitted)).

court found that the fee limitation deprives unrepresented claimants, especially those with complex claims, of the ability adequately to present their claims. (Op. 38a). The fee limitation also has a chilling effect on First Amendment rights of the few veterans who do obtain attorneys by arbitrarily limiting the scope and nature of the legal services the attorneys can provide. (Op. 27a).[26] The fee limitation is more drastic than the restrictions in the union and NAACP solicitation cases, which did not completely choke off access to lawyers but left individuals free to retain lawyers without the aid of those organizations. The fee limitation effectively prevents nearly all veterans from securing legal assistance from any source. The fee limitation's adverse impact upon veterans' ability to mount their claims is heightened by the fact that the VA is the sole forum in which veterans' disability claims may be heard. For these reasons, the district court properly held that the fee limitation violates the First Amendment by preventing the individual appellees from retaining attorneys at their own expense.[27]

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[26] In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held unconstitutional the sections of the Federal Election Campaign Act of 1971 that limited expenditures by candidates for federal office. The Court explained that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." 424 U.S. at 19. Similarly, the $10 ceiling on the amount a veteran can spend on a lawyer necessarily restricts the number and type of issues that the claimant can raise and the depth of their exploration. Especially for veterans with complex claims that raise important political issues, such as atomic radiation and Agent Orange claims, this heavily burdens their First Amendment rights.

[27] Paradoxically, the VA recognizes that the right to be represented by counsel is an important part of the right to meaningful access to the VA adjudication system—38 C.F.R. Sections 3.103(d), 19.150 provide that each claimant has a right to be represented by an attorney of his choice. The fee limitation frustrates this right, however, by preventing SCDD claimants from retaining lawyers and receiving legal assistance.

B. The Fee Limitation Violates the First Amendment Rights of Organizational Appellees to Obtain Effective Legal Representation for their Members or Constituents

Swords and NARS were founded to serve and protect the interests of Vietnam veterans and veterans exposed to atomic radiation, respectively. Both organizations desire to provide legal representation for members or constituents who have potential or existing SCDD claims. However, the fee limitation cripples their ability to do so—neither Swords nor NARS can afford to provide sufficient free legal representation. Their inability to obtain reasonable compensation prevents Swords and NARS from providing services which they want to provide and which their constituents desperately seek and need. Thus, the district court found that the fee limitation also impairs the First Amendment rights of NARS and Swords to obtain effective legal representation for their members and constituents. (Op. 40a-43a). This holding was grounded on the principle that the rights to petition, speech, and association include the right of groups to obtain attorneys for their members without barriers from restrictive regulation where legal representation is necessary to effective access to governmental processes. *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-7 (1964); *NAACP v. Button*, 371 U.S. 415, 437 (1963); *see also United Transportation Union v. State Bar of Michigan*, 401 U.S. 576 (1971).

The position of Swords and NARS is akin to that of the unions in *United Transportation Union, Brotherhood of Railroad Trainmen*, and *United Mine Workers*. Like the unions whose efforts to secure effective legal representation for their members were stymied by restrictive state regulation, the fee limitation effectively precludes Swords and NARS from providing legal representation or advice for the veterans they were organized to assist, thwarting advancement of claims by NARS' and Swords' members to obtain compensation for disabling injuries. Therefore, the fee limitation constitutes an unwarranted violation of the First Amendment. A statute cannot "under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. at 438-39. Finally, special

scrutiny is warranted here because VA may be attempting to chill the exercise of First Amendment rights that might adversely affect its own interests. *See Porter v. Califano,* 592 F.2d 770, 780 (5th Cir. 1979) ("Especially where the government is one of the parties in the related litigation, courts must most carefully scrutinize government action which attempts to chill private speech designed to raise funds for the legal fees of the private party litigating . . . .").

C. The Fee Limitation Serves No Substantial Governmental Interest

A statute that impairs First Amendment rights can survive judicial scrutiny only if it serves substantial government interests, and is narrowly drawn to serve those interests. *NAACP v. Button,* 371 U.S. 415, 432-33 (1973); *In re Primus,* 436 U.S. 412, 432-33 (1978); *see also Buckley v. Valeo,* 424 U.S. 1, 14-23, 44-45 (1976). The district court found that VA offered no such substantial justification. (Op. 47a-48a). Below, the government sought to defend the fee restriction based only upon its paternalistic conception of veterans' interests—the prevention of overreaching by unscrupulous lawyers, and veterans' financial interest in receiving SCDD undepleted by legal fees. (*Id.*). As discussed above, the fee limitation serves no substantial government interest. Furthermore, the paternalistic arguments raised by VA are particularly suspect in the First Amendment context. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 770 (1976) (First Amendment assumes "that people will perceive their own best interests if only they are well enough informed").[28]

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[28] Even if appellees' claimed paternalistic interest were substantial, the fee limitation still would be unconstitutional because it is not a "narrowly drawn regulatio[n] designed to serve [the] interes[t] without unnecessarily interfering with First Amendment freedoms" (citations omitted). *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637 (1980). A statute that intrudes on First Amendment freedoms must be "a precisely tailored means" of serving the substantial government interest that justifies it. *Secretary of State of Maryland v. Joseph H. Munson Co.,* 104 S. Ct. 2839, 2849 (1984). If the government's interest could be served "by measures less intrusive," then the statute is unconstitutional. *Id.* In *Schaumburg,* the challenged statute prohibited charities from paying expenses of more than 25% of the amount raised. The purpose of the statute was to prevent fraud. The Court noted that, rather than impose such an arbitrary ceiling, the statute could have punished fraud directly. 444 U.S. at 637-38 (1980). Similarly, the ostensible purpose of the fee limitation is to prevent fraud by attorneys. (Apps. E, I). As in *Schaumburg,* this purpose could be accomplished simply by punishing fraud directly. Indeed, state and local bar associations now perform this function. Because the statute is not narrowly drawn to serve its ostensible purpose, it is an unconstitutionally overbroad infringement of First Amendment freedoms.

III. CONGRESS HAS MADE NO FACTUAL FINDINGS CONCERNING THE FEE LIMITATION TO WHICH THE DISTRICT COURT SHOULD HAVE DEFERRED

A. Congress Has Made No Factual Findings Concerning the Fee Limitation

VA not only seeks to negate the record before the district court, but also urges this Court to substitute a different "record" drawn from legislative proposals for judicial review of VA decisions.[29] VA suggests this Congressional activity implies that Congress has determined the fee limitation to be fair, and the Court, therefore, ought to assume its fairness conclusively. (BFA 38). Analysis of the material cited by VA, however,

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[29] Significantly, the legislative "determinations" VA now raises were not presented to the district court. (*See* R 19; R 82; R 176). Rather, VA argued that appellees' claims were foreclosed by *Gendron* and *Demarest*'s property interest rulings, a position VA now abandons. Thus, VA is precluded from raising its "legislative determination" argument on appeal. *Dothard v. Rawlinson,* 433 U.S. 321, 323 n.1 (1977) ("Not having been raised in the District Court, that issue is not before us."); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 147 n.2 (1970) (court declined to consider issue not raised below); *Van Huffel v. Harkelrode,* 284 U.S. 225, 229 (1931) ("[N]either of these objections was made below, nor were they discussed by any of the state courts. They cannot, therefore, be urged here."); *Virginian Railway Co. v. Mullens,* 271 U.S. 220, 227-28 (1926); *New York ex rel. Rosevale Realty Co. v. Kleinert,* 268 U.S. 646, 650 (1925); *Peck v. Heurich,* 167 U.S. 624, 628 (1897) (appellant could not raise argument not raised in the trial court because appellees would have introduced evidence to prove the contrary in the trial court, had appellant raised argument there).

reveals that Congress has never made findings of fact to which the district court might have deferred.

1. Congress Made No Findings of Fact When It Enacted the Fee Limitation

Scrutiny of the legislative history surrounding enactment and reenactment of the fee limitation, summarized in Appendix I, shows that Congress has never made express findings concerning the fee limitation.[30] Furthermore, this legislative history demonstrates that, contrary to VA's suggestion, the fee limitation was not: (1) part of a legislative "experiment" in "alternative dispute resolution" (BFA 16, 32); (2) designed to speed up the processing of VA claims (BFA 27); (3) an "important aspect of the informal and nonadversarial claim system . . . " (BFA 30); or (4) intended to serve any government interest whatsoever. Rather, its sole purpose was to protect veterans and their survivors from unscrupulous attorneys who were charging exorbitant fees for the purely clerical task of filling out simple pension claim forms. (MA App. E; App. I). Between 1862, when the fee limitation was first adopted, and the New Deal, the fee limitation expressly applied only to the essentially clerical task of completing the paperwork to obtain military pensions. (*Id.*) In reenacting the fee limitation, Congress never expressly considered the applicability of the fee limitation to the more extensive legal services

[30] VA apparently has abandoned its contention, advanced in the Jurisdictional Statement, that Congress made formal findings of fact with regard to the fee limitation. (JS 18-19). When Congress passes a law it may make findings of fact and set them forth in the statute or its preamble. For example, in passing the National Labor Relations Act, Pub. L. No. 198, 49 Stat. 449 (1935), Congress made specific findings that were embodied in the statute. However, Congress made no such findings of fact when it enacted or reenacted the fee limitation. *See* Act of Sept. 2, 1958, Pub. L. 85-855, 72 Stat. 1105; Veterans' Benefits Act of 1957, Pub. L. 85-56, 71 Stat. 83; (*see also* MA App. E; App. I). Thus there are no legislative findings of fact to which the district court should have or could have deferred. Apparently recognizing this fact, VA now abandons the "findings of fact" nomenclature. Instead, VA refers even more vaguely to legislative "determinations." (BFA 16, 34, 35, 38, 43). As shown below, upon examination these "determinations" turn out to be anything but that.

required by the complex SCDD programs and procedures created by Executive Orders in 1933, or to complex claims that have surfaced in the last decade. Various reenactments of the fee limitation, culminating in 1958, merely involved reorganization or consolidation of veterans' legislation, and the fee limitation was not mentioned in congressional debates or committee reports. (*See* App. I). Rather, it was mechanically subsumed as part of the existing body of veterans' law. Thus, Congress never made findings of fact when it enacted and reenacted the fee limitation. There is nothing in the legislative history concerning enactment of the fee limitation to which the district court could have deferred. To the contrary, the legislative history points only to the outmoded nature of the fee limitation.

2. The Court Should Not Defer to Unsworn VA Statements Before Congressional Committees or to Senate Committee Reports Concerning Bills That Died in House Committee

VA's deference argument is principally based upon legislative events subsequent to the most recent reenactment of the fee limitation in 1958. While VA makes a series of vague allusions to "recent" congressional action, it relies almost exclusively upon Senate Committee reports regarding omnibus bills that died in House committee and unsworn, conclusory statements of VA officials to legislative committees. None of these statements was subject to cross-examination. Examination of these materials shows that it is wholly misleading for VA to suggest that Congress recently made "legislative determinations" or "findings" regarding the fee limitation. (*See* BFA 16, 34, 35, 38, 43).

Various bills to provide for judicial review of VA decisions have been introduced in Congress in recent years. Each bill contained tangential amendments to the fee limitation allowing for additional fees in civil actions for judicial review of VA decisions. Each judicial review bill unanimously passed the Senate, but died in the House Veterans Affairs Committee ("HVAC").[31] (VA obliquely states that these bills "failed of

[31] The "Veterans' Administration Adjudication Procedure and Judicial Review Act," S. 636, 98th Cong., 1st Sess. (1983), was unanimously approved by the Senate Veterans' Affairs Committee ("SVAC") on May 18, 1983, and was passed in the Senate by

adoption," implying incorrectly they were voted upon and defeated. (BFA 35)). Thus, unless the Court wishes to defer to inaction by the twelve members of HVAC, there is nothing to which the Court might defer. Certainly, HVAC cannot be the arbiter of the constitutionality of legislation. Particularly when the legislative process has not been completed, the Court has been extremely reluctant to draw inferences regarding congressional intent. *See Wong Yang Sung v. McGrath*, 339 U.S. 33, 47, *modified on other grounds*, 339 U.S. 908 (1950) (where bill passed appropriate committees of both Houses and Congress adjourned without taking action, the Court refused to draw inference from "incompleted steps in the legislative process."). Even if the House had voted on bills containing amendments to the fee limitation, "unsuccessful attempts at legislation are not the least of guides to legislative intent." *Red Lion Broadcasting*

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unanimous voice vote on June 15, 1983. The HVAC took no action on it and the bill died with the close of Congress. The "Veterans' Administration Adjudication Procedure and Judicial Review Act," S. 349, 97th Cong., 2d Sess. (1982), was unanimously approved by the SVAC on June 8, 1982, and was passed in the Senate by unanimous voice vote on September 14, 1982. The HVAC took no action on it. The Veteran's Administration Adjudication and Judicial Review Act," S. 330, 96th Cong., 1st Sess. (1979), was approved by the SVAC with only one dissenting vote on May 3, 1979, and was passed in the Senate by unanimous voice vote on September 17, 1979. The HVAC took no action on it. Each of the foregoing bills was an omnibus bill which mainly involved judicial review. *See Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing on S. 636 and Related Bills Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 10 (1983) (prepared statement of Hon. Gary Hart, U.S. Senator) ("[T]he cent[ral] issue contained in this legislation [was] judicial review . . . ."). They only secondarily involved aspects of the fee limitation. Congress has never considered a discrete bill to amend the fee limitation. As stressed by this Court in *Gemsco, Inc. v. Walling*, 324 U.S. 244, 265 (1944), "Rejection of an entire bill cannot be taken to be a specific rejection of each and every feature . . . ." This view should be of greater force here, where the omnibus bills not only were not defeated by any vote of Congress, but were never even reported out of committee in the House of Representatives.

Co., Inc. v. Federal Communications Commission, 395 U.S. 367, 382 n.11 (1969); *see also United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947). Furthermore, the Court should not attach any significance to VA's selective rendition of committee reports concerning bills not passed by Congress, especially because these reports contain other statements recognizing the unfairness of the fee limitation.[32]

VA's suggestion that the Court ought to defer to hearsay opinions expressed by VA officials in unsworn statements before Congressional committees considering judicial review bills is similarly misguided. (BFA 29, 40). (Notably, Senator Alan Cranston, a leading member of the SVAC, described VA's March 23, 1983, testimony regarding S. 636 as presenting "misleading arguments and distortions." *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal Year 1984 Major Construction Project Proposals: Hearing on S.636 and Related Bills Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. (1983) (introductory statement of Hon. Alan Cranston, U.S. Senator)). Appellees could marshal many trenchant statements before Congress emphasizing the fundamental unfairness of the VA adjudication system, including the fee limitation.[33] However, this material is

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[32] *See, e.g.*, S. Rep. No. 97-466, 97th Cong., 2d Sess. 50-51 (1982): "The Committee is also of the view that the current statutory limitation is an undue hindrance on the rights of veterans and other claimants to select representatives of their own choosing to represent them in VA matters . . . [A]n individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied . . . . A claimant could well conclude, for example, that some further development of the administrative record in a complex case would be of critical importance while the matter is still before the agency and that an attorney would be better able to so develop the record."

[33] *See Veterans' Administration Adjudication Procedure and Judicial Review Act: Hearing on S. 349 and Related Issues Before the Senate Comm. on Veterans' Affairs*, 97th Cong., 1st Sess. 457, 460-61 (1981) (testimony of Frederick Davis, Past Chairman, ABA Committee on Veterans); *id.* at 462-63 (prepared statement of Frederick Davis); *id.* at 473-74 (testimony of Ronald Simon, National Veterans'

of very little value in resolving the constitutional issues before the Court. *Cf. Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980) ("The less formal types of subsequent legislative history provide an extremely hazardous basis for inferring the meaning of a congressional enactment").[34]

B. The Abject Deference to Congressional Action or Inaction Sought by VA Is Inappropriate in a Procedural Due Process or First Amendment Case

Disclaiming any obligation even to address the district court's factual findings, VA argues that the district court exceeded its authority in determining the procedural requirements guaranteed by the Fifth Amendment's Due Process Clause,[35] and that it

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Law Center); *Veterans' Administration Adjudication Procedure and Judicial Review Act and the VA's Fiscal year 1984 Major Construction Project Proposals: Hearing on S. 636 and Related Bills Before the Senate Comm. on Veterans' Affairs*, 98th Cong., 1st Sess. 141 (1983) (prepared statement of Frederick Davis, Past Chairman, ABA Committee on Veterans).

[34] *See also United States v. United Mine Workers of America*, 330 U.S. 258, 281-82 (1947) (Court declined to rely upon views of several senators regarding construction of Norris-LaGuardia Act); *Selective Service System v. Minnesota Public Interest Research Group*, 104 S.Ct. 3348, 3357 n.15 (1984) (statements by legislators opposed to statute are entitled to "little, if any, weight"); *Weinberger v. Rossi*, 456 U.S. 25, 34-35 (1982) (Court refused to rely upon isolated comments taken out of context from statement by Senate sponsor); *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 582 n.3 (1982) (personal views of legislators carry little weight).

[35] VA, while not articulating it as an issue presented, also apparently objects to the scope of the preliminary injunction. (BFA 13-14). It is well-established that when a court finds a statute unconstitutional it may properly issue a blanket injunction that prevents its enforcement. *See* Appellees' Opposition to VA's Motion for a Stay filed in this Court on September 24, 1984 (A-214). "[I]nsofar as the relief sought is prohibitory, an action seeking declaratory or injunctive relief . . . on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality . . . ." *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974). Instances in which courts have

should have conclusively assumed the procedural fairness of the VA system based upon supposed legislative "determinations" regarding "the nature and operation of the claims procedure." (BFA 34).[36] VA misapprehends the role of the judiciary in procedural due process and First Amendment cases. While Congress may create property interests, such as the interest in SCDD, the Court must determine what procedures the Constitution guarantees to those who possess such property interests. *Vitek v. Jones*, 445 U.S. 480, 490-91 n.6 (1980); *Arnett v. Kennedy*, 416 U.S. 134, 166-67 (1974) (Powell, J., concurring in part); *Elliott v. Weinberger*, 564 F.2d 1219, 1230 (9th Cir. 1977), *aff'd in part and reversed in part sub nom. California v.*

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enjoined government officials from enforcing an invalid statute or regulation not only against the particular plaintiffs, but against everyone, are legion. *See, e.g., Sandford v. R.L. Coleman Realty Co., Inc.*, 573 F.2d 173, 178-79 (4th Cir. 1978); *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, Florida*, 493 F.2d 799, 812 (5th Cir. 1974); *Galvan v. Levine*, 409 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974); *Tinetti v. Wittke*, 479 F. Supp. 486, 488 (E.D. Wis. 1979), *aff'd*, 620 F.2d 160 (7th Cir. 1980); *Officers for Justice v. Civil Service Commission of City and County of San Francisco*, 371 F. Supp. 1328, 1342 (N.D. Cal. 1973); and *Vulcan Society of New York City Fire Department v. Civil Service Commission of City of New York*, 360 F. Supp. 1265, 1266-67 n. 1 (S.D.N.Y.), *aff'd*, 490 F.2d 387 (2d Cir. 1973). Finally, the district court's factual findings and the uncontroverted evidence before the district court demonstrate that the fee limitation is unconstitutional in all of its applications.

[36] VA also advances the novel argument that the constitutionality of a federal statute cannot depend on the factual record developed by the parties in the district court. (BFA 37). If this argument were correct, then no as-applied constitutional claims could be heard in the courts of original jurisdiction in the federal system. Moreover, the record herein was based upon national discovery, nationwide statistics, and testimony from VA officials throughout the VA system, including its highest levels. Therefore, the record would be similar regardless of the district in which the action were brought. Finally, in the unlikely circumstance that the records or determinations in two cases conflict, the Court conducts such factual reexamination as might be necessary to resolve the conflict. *See Sanitary Refrigerator Co. v. Winters*, 280 U.S. 30, 35-36 (1929).

Yamasaki, 442 U.S. 682 (1979). Similarly, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment interests are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

VA's articulation of the Court's proper role in procedural due process actions is contradicted by the approach the Court has uniformly taken in procedural due process cases. Due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Santosky v. Kramer*, 455 U.S. 745, 754 (1982); *Little v. Streater*, 452 U.S. 1, 5 (1981). In *Santosky v. Kramer*, the Court unambiguously stated its approach to procedural due process cases: "the Court has engaged in a straightforward consideration of the factors identified in *Eldridge* to determine whether a particular standard of proof in a particular proceeding satisfies due process." 455 U.S. at 754. These principles are reflected in *Parham v. J. R.*, 442 U.S. 584 (1979), where the Court examined a "voluminous record" as to the operation of "the Georgia process [for voluntary commitment of children to mental hospitals] in its setting," rather than relying strictly on applicable statutory material. 442 U.S. at 614, 616. The district court relied upon "expert and lay testimony and extensive exhibits" and even visited two of the State's regional mental health hospitals. *Id.* at 588. Similarly, the Court repeatedly relied upon the record in reaching its own decision. *Id.* at 597-98, 614-17. Likewise, in *Morrissey v. Brewer*, addressing procedural due process requirements in parole revocations, the Court considered extensive factual material concerning the circumstances surrounding the revocation of petitioners' paroles, the nature of the setting, the individual and state interests, the administrative system and practices, and the function of parole in the correctional process. 408 U.S. at 472-84.

VA's argument that the Court should disregard the evidence introduced below is misguided, particularly in light of appellees' as-applied due process challenge. Even if Congress had made

findings of fact when it enacted the fee limitation, the district court would have been correct to consider the evidence of record in resolving appellees' claims. As Justice Harlan wrote for the Court in *Leary v. United States*, 395 U.S. 6 (1969), a procedural due process attack upon a statutory presumption: "A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration. *See Block v. Hirsh*, 256 U.S. 135, 154-155 (1921); *Communist Party v. Subversive Activities Control Board*, 367 U.S. 1, 110-114 (1961)." *Id.* at 38 n.68; *see also Turner v. United States*, 396 U.S. 398 (1970) (similar presumption unconstitutional as applied to cocaine, based on Court's assessment of evidence); *Carey v. Population Services International*, 431 U.S. 678, 695 (1977) (ban on selling contraceptives to minors was unconstitutional—evidence did not show that there was a deterrent effect upon sexual activity). Similarly, the Court has held in the First Amendment context that

> [d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. A legislature appropriately inquires into and may declare the reasons impelling legislative action but the judicial function commands analysis of whether the specific conduct charged falls within the reach of the statute and if so whether the legislation is consonant with the Constitution. Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978); *accord, Whitney v. California*, 274 U.S. 357, 378-79 (1927) (Brandeis and Holmes, J.J., concurring), *overruled on other grounds, Brandenburg v. Ohio*, 395 U.S. 444 (1969). Thus, even if Congress had made factual findings in enacting the fee limitation, the district court would have been correct to consider the facts presented to it in resolving appellees' claims.

The cases VA cites as support for the proposition that the courts should defer to congressional "determinations" are inapposite. (BFA 35). They uniformly involve equal protection

and/or substantive due process,[37] *Vance v. Bradley*, 440 U.S. 93, 94-97 (1979); *Oregon v. Mitchell*, 400 U.S. 112 (1970); *Radice v. New York*, 264 U.S. 292 (1924); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 586, 594 (1939); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342 (1916), or a claimed unconstitutional taking of property, *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2872 (1984); *Texaco, Inc. v. Short*, 454 U.S. 516, 525-30 (1982). Such cases involve application of the "rational basis" test.[38] This

[37] VA cites Justice Brennan's dissent and concurrence in *Oregon v. Mitchell*, 400 U.S. 112 (1970), for the proposition that a court must defer to Congress's factfinding unless it is "arbitrary," "irrational," or "unreasonable," without mentioning that this statement was made in the context of an equal protection challenge to the age restriction on voting in which the applicable standard was the rational basis test. *See* 400 U.S. at 246-48. As the Court explained in *Vance v. Bradley*, 440 U.S. 93: "In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker." 440 U.S. at 111. This is not the standard here. Moreover, two of the cases cited by VA involved the special deference given Congress when it acts to protect the national security. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (equal protection challenge to male draft); *Communist Party of United States v. Subversive Activities Control Board*, 367 U.S. 1, 102-03 (1961) (registration of Communists).

[38] Even in cases involving the rational basis test, the Court has recognized that litigants are free to mount as-applied challenges. "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry, [citation omitted] and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the Court that those facts have ceased to exist. [Citation omitted]. Similarly we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason . . . [citations omitted] though the effect of such proof depends on the relevant circumstances of each case . . . ." *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938).

is not the appropriate standard in procedural due process or First Amendment cases.[39]

In sum, VA's contention that the Court should have resorted solely to material outside the record, and more particularly to VA's selective rendition of excerpts from legislative proceedings, is completely antithetical to the responsibility of courts in due process and First Amendment cases.[40]

[39] None of the cases cited by VA stands for the proposition that the Court should defer to Congress in determining which process is due applicants for a statutory entitlement. (BFA 37 n.38). *Middendorf v. Henry*, 425 U.S. 25 (1976), the only procedural due process case VA relies upon, involved summary courts-martial, and the Court relied upon the traditional deference given to Congress based upon the need for discipline and duty in the military. 425 U.S. at 43. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 102 (1972), was not even a procedural due process case. Justice White's concurrence and dissent in *Arnett v. Kennedy*, 416 U.S. 134, 202 (1974), states only that "to some extent, the Court must share with Congress . . . a role in defining constitutional requirements."

[40] VA implies that the fairness of the fee limitation is a political question for Congress to decide. (BFA 43-46). This argument is unpersuasive. "No policy underlying the political question doctrine suggests that Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts." *Immigration and Naturalization v. Chadha*, 103 S. Ct. 2764, 2779 (1983).

CONCLUSION

For the foregoing reasons, the district court did not abuse its discretion in holding that appellees were likely to succeed on the merits of their claims that the fee limitation, as applied, violates their procedural due process and First Amendment rights. The district court properly enjoined the enforcement of the $10.00 fee limitation applicable to SCDD claims pending trial on the merits, and the Court should affirm.

Dated: March 7, 1985

Respectfully submitted,

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APPENDIX H

STATUTES INVOLVED

UNITED STATES CODE
TITLE 38 — VETERANS' BENEFITS
CHAPTER 3 — VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES
SUBCHAPTER II — ADMINISTRATOR OF VETERANS' AFFAIRS

§ 211. Decisions by Administrator; opinions of Attorney General

(a) On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

(b) The Administrator may require the opinion of the Attorney General on any question of law arising in the administration of the Veterans' Administration.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1115; Pub. L. 89-214, § 1(b), Sept. 29, 1965, 79 Stat. 886; Pub. L. 89-358, § 4(h), Mar. 3, 1966, 80 Stat. 24; Pub. L. 91-376, § 8(a), Aug. 12, 1970, 84 Stat. 790.)

UNITED STATES CODE
CHAPTER 11 — COMPENSATION FOR SERVICE-CONNECTED DISABILITY OR DEATH
SUBCHAPTER II — WARTIME DISABILITY COMPENSATION

§ 310. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1119.)

§ 314. Rates of wartime disability compensation

For the purposes of section 310 of this title—

(a) if and while the disability is rated 10 per centum the monthly compensation shall be $62;

(b) if and while the disability is rated 20 per centum the monthly compensation shall be $114;

(c) if and while the disability is rated 30 per centum the monthly compensation shall be $173;

(d) if and while the disability is rated 40 per centum the monthly compensation shall be $249;

(e) if and while the disability is rated 50 per centum the monthly compensation shall be $352;

(f) if and while the disability is rated 60 per centum the monthly compensation shall be $443;

(g) if and while the disability is rated 70 per centum the monthly compensation shall be $559;

(h) if and while the disability is rated 80 per centum the monthly compensation shall be $648;

(i) if and while the disability is rated 90 per centum the monthly compensation shall be $729;

(j) if and while the disability is rated as total the monthly compensation shall be $1,213;

SUBCHAPTER III — WARTIME DEATH COMPENSATION

§ 321. Basic entitlement

The surviving spouse, child, or children, and dependent parent or parents of any veteran who died before January 1, 1957 as the result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during a period of war, shall be entitled to receive compensation at the monthly rates specified in section 322 of this title.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1122; Pub. L. 92-197, § 6, Dec. 15, 1971, 85 Stat. 662; Pub. L. 94-433, title IV, § 404(12), Sept. 30, 1976, 90 Stat. 1378.)

§ 322. Rates of wartime death compensation

(a) The monthly rates of death compensation shall be as follows:

(1) Surviving spouse but no child, $87;

(2) Surviving spouse with one child, $121 (with $29 for each additional child);

(3) No surviving spouse but one child, $67;

(4) No surviving spouse but two children, $94 (equally divided);

(5) No surviving spouse but three children, $122 (equally divided) (with $23 for each additional child, total amount to be equally divided);

(6) Dependent parent, $75;

(7) Both dependent parents, $40 each.

SUBCHAPTER IV — PEACETIME DISABILITY COMPENSATION

§ 331. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is the result of the veteran's own willful misconduct.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1122.)

§ 334. Rates of peacetime disability compensation

For the purposes of section 331 of this title, the compensation payable for the disability shall be that specified in section 314 of this title.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1123; Pub. L. 92-328, title I, § 108(a), June 30, 1972, 86 Stat. 396.)

SUBCHAPTER V — PEACETIME DEATH COMPENSATION

§ 341. Basic entitlement

The surviving spouse, child or children, and dependent parent or parents of any veteran who died before January 1, 1957, as the

result of injury or disease incurred in or aggravated by active military, naval, or air service, in line of duty, during other than a period of war, shall be entitled to receive compensation as hereinafter provided in this subchapter.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1123; Pub. L. 92-197, § 6, Dec. 15, 1971, 85 Stat. 662; Pub. L. 94-433, title IV, § 404(18), Sept. 30, 1976, 90 Stat. 1379.)

§ 342. Rates of peacetime death compensation

For the purposes of section 341 of this title, the monthly rates of death compensation payable shall be those specified in section 322 of this title.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1124; Pub. L. 93-295, title II, § 206(a), May 31, 1974, 88 Stat. 183.)

§ 355. Authority for schedule for rating disabilities

The Administrator shall adopt and apply a schedule of ratings of reductions in earning capacity from specific injuries or combination of injuries. The ratings shall be based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations. The schedule shall be constructed so as to provide ten grades of disability and no more, upon which payments of compensation shall be based, namely, 10 per centum, and total, 20 per centum, 30 per centum, 40 per centum, 50 per centum, 60 per centum, 70 per centum, 80 per centum, 90 per centum, and total, 100 per centum. The Administrator shall from time to time readjust this schedule of ratings in accordance with experience.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1125.)

CHAPTER 57 — RECORDS AND INVESTIGATIONS
SUBCHAPTER II — INVESTIGATIONS

§ 3311. Authority to issue subpenas

For the purposes of the laws administered by the Veterans' Administration, the Administrator, and those employees to whom the Administrator may delegate such authority, to the

extent of the authority so delegated, shall have the power to issue subpenas for and compel the attendance of witnesses within a radius of one hundred miles from the place of hearing, to require the production of books, papers, documents, and other evidence, to take affidavits, to administer oaths and affirmations, to aid claimants in the preparation and presentation of claims, and to make investigations and examine witnesses upon any matter within the jurisdiction of the Veterans' Administration. Any person required by such subpena to attend as a witness shall be allowed and paid the same fees and mileage as are paid witnesses in the district courts of the United States.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1237.)

UNITED STATES CODE
CHAPTER 59—AGENTS AND ATTORNEYS

§ 3402. Recognition of representatives of organizations

(a) (1) The Administrator may recognize representatives of the American National Red Cross, the American Legion, the Disabled American Veterans, the United Spanish War Veterans, the Veterans of Foreign Wars, and such other organizations as he may approve, in the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

(2) The Administrator may, in his discretion, furnish, if available, space and office facilities for the use of paid full-time representatives of national organizations so recognized.

(b) No individual shall be recognized under this section—

(1) unless he has certified to the Administrator that no fee or compenstaion of any nature will be charged any individual for services rendered in connection with any claim; and

(2) unless, with respect to each claim, such individual has filed with the Administrator a power of attorney, executed in such manner and form as the Administrator may prescribe.

(c) Service rendered in connection with any such claim, while not on active duty, by any retired officer, warrant officer, or enlisted man of the Armed Forces recognized under this section shall not be a violation of sections 203, 205, 206 or 207 of title 18.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238; Pub. L. 91-24, § 12(b), June 11, 1969, 83 Stat. 34.)

§ 3403. Recognition with respect to particular claims

The Administrator may recognize any individual for the preparation, presentation, and prosecution of any particular claim for benefits under any of the laws administered by the Veterans' Administration if—

(1) such individual has certified to the Administrator that no fee or compensation of any nature will be charged any individual for services rendered in connection with such claim; and

(2) such individual has filed with the Administrator a power of attorney, executed in such manner and in such form as the Administrator may prescribe.

(Pub. L. 85-857, Sept. 12, 1958, 72 Stat. 1238.)

§ 3404. Recognition of agents and attorneys generally

(a) The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration. The Administrator may require that individuals, before being recognized under this section, show that they are of good moral character and in good repute, are qualified to render claimants valuable service, and otherwise are competent to assist claimants in presenting claims.

(b) The Administrator, after notice and opportunity for a hearing, may suspend or exclude from further practice before the Veterans' Administration any agent or attorney recognized under this section if he finds that such agent or attorney—

(1) has engaged in any unlawful, unprofessional, or dishonest practice;

(2) has been guilty of disreputable conduct;

(3) is incompetent;

(4) has violated or refused to comply with any of the laws administered by the Veterans' Administration, or with any of the regulations or instructions governing practice before the Veterans' Administration; or

(5) has in any manner deceived, misled, or threatened any actual or prospective claimant.

(c) The Administrator shall determine and pay fees to agents or attorneys recognized under this section in allowed claims for monetary benefits under laws administered by the Veterans' Administration. Such fees—

(1) shall be determined and paid as prescribed by the Administrator;

(2) shall not exceed $10 with respect to any one claim; and

(3) shall be deducted from monetary benefits claimed and allowed.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1238.)

§ 3405. Penalty for certain acts

Whoever (1) directly or indirectly solicits, contracts for, charges, or receives, or attempts to solicit, contract for, charge, or receive, any fee or compensation except as provided in sections 3404 or 784 of this title, or (2) wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him, shall be fined not more than $500 or imprisoned at hard labor for not more than two years, or both.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1239.)

PART V—BOARDS AND DEPARTMENTS
CHAPTER 71—BOARD OF VETERANS' APPEALS

§ 4001. Composition of Board of Veterans' Appeals

(a) There shall be in the Veterans' Administration a Board of Veterans' Appeals (hereafter in this chapter referred to as the "Board") under the administrative control and supervision of a chairman directly responsible to the Administrator. The Board shall consist of a Chairman, a Vice Chairman, such number (not more than fifty) of associate members as may be found necessary, and such other professional, administrative, clerical, and stenographic personnel as are necessary in conducting hearings and considering and disposing of appeals properly before the Board.

(b) Members of the Board (including the Chairman and Vice Chairman) shall be appointed by the Administrator with the approval of the President.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1240.)

§ 4003. Determinations by the Board

(a) The determination of the section, when unanimously concurred in by the members of the section shall be the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

(b) When there is a disagreement among the members of the section the concurrence of the Chairman with the majority of members of such section shall constitute the final determination of the Board, except that the Board on its own motion may correct an obvious error in the record, or may upon the basis of additional official information from the service department concerned reach a contrary conclusion.

(Pub. L. 85-857, Sept. 2, 1958, 72 Stat. 1241.)

§ 4004. Jurisdiction of the Board

(a) All questions on claims involving benefits under the laws administered by the Veterans' Administration shall be subject to one review on appeal to the Administrator. Final decisions on such appeals shall be made by the Board.

(b) When a claim is disallowed by the Board, it may not thereafter be reopened and allowed, and no claim based upon the same factual basis shall be considered; however, where subsequent to disallowance of a claim, new and material evidence in the form of official reports from the proper service department is secured, the Board may authorize the reopening of the claim and review of the former decision.

(c) The Board shall be bound in its decisions by the regulations of the Veterans' Administration, instructions of the Administrator, and the precedent opinions of the chief law officer.

(d) The decisions of the Board shall be in writing and shall contain findings of fact and conclusions of law separately stated.

(Pub L. 85-857, Sept. 2 1958, 72 Stat. 1241; Pub. L. 87-97, § 1, July 20, 1961, 75 Stat. 215.)

§ 4005. Filing of notice of disagreement and appeal

(a) Appellate review will be initiated by a notice of disagreement and completed by a substantive appeal after a statement of the case is furnished as prescribed in this section. Each appellant will be accorded hearing and representation rights pursuant to the provisions of this chapter and regulations of the Administrator.

(b)(1) Except in the case of simultaneously contested claims, notice of disagreement shall be filed within one year from the date of mailing of notice of the result of initial review or determination. Such notice, and appeals, must be in writing and be filed with the activity which entered the determination with which disagreement is expressed (hereafter referred to as the "agency of original jurisdiction"). A notice of disagreement

postmarked before the expiration of the one-year period will be accepted as timely filed.

(2) Notices of disagreement, and appeals, must be in writing and may be filed by the claimant, his legal guardian, or such accredited representative, attorney, or authorized agent as may be selected by him. Not more than one recognized organization, attorney, or agent will be recognized at any one time in the prosecution of a claim.

(c) If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or determination shall become final and the claim will not thereafter be reopened or allowed, except as may otherwise be provided by regulations not inconsistent with this title.

(d)(1) Where the claimant, or his representative, within the time specified in this chapter, files a notice of disagreement with the decision of the agency of original jurisdiction, such agency will take such development or review action as it deems proper under the provisions of regulations not inconsistent with this title. If such action does not resolve the disagreement either by granting the benefit sought or through withdrawal of the notice of disagreement, such agency will prepare a statement of the case consisting of—

(A) A summary of the evidence in the case pertinent to the issue or issues with which disagreement has been expressed;

(B) A citation or discussion of the pertinent law, regulations, and, where applicable, the provisions of the Schedule for Rating Disabilities;

(C) The decision on such issue or issues and a summary of the reasons therefor.

(2) A statement of the case, as required by this subsection, will not disclose matters that would be contrary to section 3301 of this title or otherwise contrary to the public interest. Such matters may be disclosed to a designated representative unless the relationship between the claimant and the representative is

such that disclosure to the representative would be as harmful as if made to the claimant.

(3) Copies of the "statement of the case" prescribed in paragraph (1) of this subsection will be submitted to the claimant and to his representative, if there is one. The claimant will be afforded a period of sixty days from the date the statement of the case is mailed to file the formal appeal. This may be extended for a reasonable period on request for good cause shown. The appeal should set out specific allegations of error of fact or law, such allegations related to specific items in the statement of the case. The benefits sought on appeal must be clearly identified. The agency of original jurisdiction may close the case for failure to respond after receipt of the statement of the case, but questions as to timeliness or adequacy of response shall be determined by the Board of Veterans' Appeals.

(4) The appellant will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken.

(5) The Board of Veterans' Appeals will base its decision on the entire record and may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed.

(Added Pub. L. 87-666, § 1, Sept. 19, 1962, 76 Stat. 553.)

§ 4009. Independent medical opinions

(a) When, in the judgment of the Board, expert medical opinion, in addition to that available within the Veterans' Administration, is warranted by the medical complexity or controversy involved in an appeal case, the Board is authorized to secure an advisory medical opinion from one or more independent medical experts who are not employees of the Veterans' Administration.

(b) The Administrator shall make necessary arrangements with recognized medical schools, universities, or clinics to furnish such advisory medical opinions at the request of the Chairman of the Board. Such arrangement will provide that the actual selection of the expert or experts to give the advisory opinion in any individual case will be made by an appropriate official of such institution.

(Added Pub. L. 87-671, § 1, Sept. 19, 1962, 76 Stat. 557.)

CODE OF FEDERAL REGULATIONS
TITLE 38

PART 3 — ADJUDICATION
Subpart A — Pension, Compensation, and Dependency and Indemnity Compensation

§ 3.102 Reasonable Doubt.

It is the defined and consistently applied policy of the Veterans Administration to administer the law under a broad interpretation, consistent, however, with the facts shown in every case. When, after careful consideration of all procurable and assembled data, a reasonable doubt arises regarding service origin, the degree of disability, or any other point, such doubt will be resolved in favor of the claimant. By reasonable doubt is meant one which exists by reason of the fact that the evidence does not satisfactorily prove or disprove the claim, yet a substantial doubt and one within the range of probability as distinguished from pure speculation or remote possibility. It is not a means of reconciling actual conflict or a contradiction in the evidence; the claimant is required to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded. Mere suspicion or doubt as to the truth of any statements submitted, as distinguished from impeachment or contradiction by evidence or known facts, is not a justifiable basis for denying the application of the reasonable doubt doctrine if the entire, complete record otherwise warrants invoking this doctrine. The reasonable doubt doctrine is also applicable even in the absence of official records, particularly if the basic incident allegedly arose under combat, or similarly strenuous conditions, and is consistent with the probable results of such known hardships.

[26 FR 1568, Feb. 24, 1961]

§ 3.103 Due process — procedural and appellate rights with regard to disability and death benefits and related relief.

(a) *Statement of policy.* Proceedings before the Veterans

Administration are ex parte in nature. It is the obligation of the Veterans Administration to assist a claimant in developing the facts pertinent to his claim and to render a decision which grants him every benefit that can be supported in law while protecting the interests of the Government. This principle and the other provisions of this section apply to all claims for benefits and relief and decisions thereon within the purview of this part.

(b) *Submission of evidence.* Any evidence whether documentary, testimonial, or in other form, offered by a claimant in support of a claim and any issue he may raise and contention and argument he may offer with respect thereto are to be included in the records.

(c) *Hearings.* Upon request a claimant is entitled to a hearing at any time on any issue involved in a claim within the purview of this part. The Veterans Administration will provide the place of hearing in the Veterans Administration office having original jurisdiction over the claim or at the Veterans Administration office nearest his home having adjudicative functions and will provide Veterans Administration personnel who have original determinative authority of such issues to be responsible for the preparation of the transcript; however, further expenses involved will be the responsibility of the claimant. The claimant is entitled to produce witnesses and all testimony will be under oath or affirmation. The purpose of such a hearing is to permit the claimant to introduce into the record in person any evidence available to him which he may consider material and any arguments and contentions with respect to the facts and applicable law which he may consider pertinent. It is the responsibility of the Veterans Administration personnel conducting the hearing to explain fully the issues and to suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to his position. It is their further responsibility to establish and preserve the record. Because of this and to assure clarity and understanding therein, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence and to discredit testimony. In cases in which the nature, origin, or degree of disability is in issue, the claimant may

request visual examination by the physician designated by the Veterans Administration as a participant in the hearing and his observations will be read into the record.

(d) *Representation.* Within the provisions and criteria of § § 14.626 through 14.663 of this chapter a claimant is entitled to representation of his choice at every stage in the prosecution of a claim.

(e) *Notification of decisions.* The claimant will be notified of any decision affecting the payment of benefits or granting relief. Notice will include the reason for the decision and the date it will be effectuated as well as the right to a hearing subject to paragraph (c) of this section. The notification will also advise the claimant of his right to initiate an appeal by filing a Notice of Disagreement which will entitle him to a Statement of the case for his assistance in perfecting his appeal. Further, the notice will advise him of the periods in which an appeal must be initiated and perfected. (See Part 19, Subpart B of this chapter on appeals.)

[37 FR 14780, July 25, 1972]

PART 14 — LEGAL SERVICES, GENERAL COUNSEL

§ 14.634 Fees and expenses

Accredited representatives of national, State or other recognized organizations and individuals recognized for a particular claim shall not be entitled to receive fees. Attorneys and agents are entitled to receive fees as provided by statute. (38 U.S.C. 3404(c)).

(a) *Amount of fees.* For the successful prosecution of claims, attorneys and agents may receive the fee permitted by statute. The fee will be paid to the attorney or agent of record at the time of allowance, by deduction from the benefit allowed, after approval by the Veterans Administration. Questions concerning the amount or proper payee of fees allowed will be resolved by the District Counsel, or designee, who will consider the quality, nature, and extent of the services.

(b) *Expenses.* Without regard to entitlement to fees, an agent, attorney, or other person who incurs an expense in the prosecution of a claim, may submit a sworn itemized account of the expense to the Veterans Administration. It will be retained in the claims folder as part of the permanent record. Payment of expenses is the responsibility of the claimant; however, before demanding or receiving reimbursement from the claimant, the expense shall be approved by the District Counsel, or designee. Notice of the action taken shall be transmitted to the requestor by the service handling the claim. (38 U.S.C. 3404).

PART 19 — BOARD OF VETERANS APPEALS
Subpart A — Appeals — General

§ 19.1 Appellate jurisdiction.

(a) *General.* All questions on claims involving benefits under the laws administered by the Veterans Administration are subject to review on appeal to the Administrator of Veterans Affairs, decisions in such cases to be made by the Board of Veterans Appeals. In its decisions, the Board is bound by the regulations of the Veterans Administration, instructions of the Administrator and precedent opinions of the General Counsel. The Board may exercise the same authority as the department having original jurisdictional responsibility. (38 U.S.C. 4004)

COMMENCEMENT OF APPEAL

§ 19.117 Rule 17; What constitutes an appeal.

An appeal consists of a timely filed notice of disagreement in writing and, after a statement of the case has been furnished, a timely filed substantive appeal. (38 U.S.C. 4005)

§ 19.118 Rule 18; Notice of disagreement

A written communication from a claimant or the representative expressing dissatisfaction or disagreement with an adjudicative determination of an agency of original jurisdiction (the Veterans Administration regional office, medical center or clinic which notified the claimant of the action taken) will constitute a notice of disagreement. The notice of disagreement should be in

terms which can be reasonably construed as a desire for review of that determination. It need not be expressed in any special wording. (38 U.S.C. 4005)

§ 19.119 Rule 19; Action by agency of original jurisdiction on notice of disagreement.

(a) *Preliminary action.* When a notice of disagreement is timely filed, the agency of original jurisdiction may develop and review the claim again. (38 U.S.C. 4005(d)(1))

(b) *Statement of the case.* If no preliminary action is required or when it is completed, the agency of original jurisdiction will prepare a statement of the case pursuant to Rule 20 (§ 19.120), unless the issue or issues are resolved by granting the benefits sought in the appeal or the notice of disagreement is withdrawn by the appellant or the representative. (38 U.S.C. 4005 (d)(i))

§ 19.120 Rule 20; Statement of the case.

(a) *Purpose.* The statement of the case should provide the appellant notice of those facts and applicable laws and regulations upon which the agency of original jurisdiction based its determination of the issue or issues. It should be complete enough to allow the appellant to present written and/or oral arguments before the Board of Veterans Appeals (38 U.S.C. 4005(d)(1))

(b) *Contents.* A statement of the case shall contain:

(1) A summary of the evidence in the case relating to the issue or issues with which the appellant or representative has expressed disagreement.

(2) A summary of the applicable law and regulations, with appropriate citations.

(3) The determination of the agency of original jurisdiction on each issue and the reasons for such determination with respect to which disagreement has been expressed. (38 U.S.C. 4005(d)(1))

§ 19.123 Rule 23; Substantive appeal.

(a) *Substantive appeal.* A substantive appeal shall consist of a properly completed VA Form 1-9, Appeal to Board of Veterans Appeals, or correspondence containing the necessary information. The appeal should set out specific arguments relating to errors of fact or law. To the extent feasible the argument should be related to specific items in the statement of the case. This is the last action the appellant needs to take to perfect the appeal. The Board will construe such arguments in a liberal manner for purposes of determining whether they raise issues on appeal. (38 U.S.C. 4005(d)(4)-(5))

(b) *Certification.* Following receipt of the substantive appeal, the agency of original jurisdiction will certify the case to the Board of Veterans Appeals. Certification is accomplished by the execution of VA Form 1-8, Certification of Appeal. Its purpose is to identify the issues for appellate consideration and to serve as a check list for the originating agency to ensure that the appeals development procedures have been adequate, particularly as they affect the appellant's due process rights. (38 U.S.C. 4005)

§ 19.124 Rule 24; Closing — failure to respond to statement of the case.

The agency of original jurisdiction may close the appeal without notice to an appellant for failure to respond to a statement of the case within the period allowed. However, if a response is subsequently received within the 1-year appeal period (except for contested claims), the appeal will be considered to be reactivated. (38 U.S.C. 4005(d)(3))

§ 19.126 Rule 26; Dismissal.

Appeals which fail to allege specific error of fact or law in the determination being appealed may be dismissed. The appellant and/or representative will be notified of the dismissal action. (38 U.S.C 4005(d)(5), 4008)

§ 19.129 Rule 29; Time limit for filing.

(a) *Notice of disagreement.* A notice of disagreement shall be filed within 1 year from the date of mailing of notification of

the initial review and determination; otherwise, that determination will become final. The date of the letter of notification will be considered the date of mailing for purposes of determining whether a timely appeal has been filed. (38 U.S.C. 4005 (b)(1))

(b) *Substantive appeal.* A substantive appeal shall be filed within 60 days from the date of mailing of the statement of the case, or within the remainder of the 1-year period from the date of mailing of the notification of the initial review and determination being appealed, whichever period ends later. The date of the statement of the case itself will be considered the date of mailing for purposes of determining whether a timely appeal has been filed. Where a supplemental statement of the case is furnished, a period of 30 days will be allowed for response. (38 U.S.C. 4005 (b)(1),(d)(3))

HEARINGS

§ 19.157 Rule 57; General.

(a) *Right to a hearing.* A hearing on appeal shall be granted if an appellant or a representative expresses a desire to appear in person. (38 U.S.C. 4002)

(b) *Purpose of hearing.* The purpose of a hearing is to receive argument and testimony relevant and material to the appellate issue. (38 U.S.C. 4002)

(c) *Nonadversary proceedings.* Hearings conducted by and for the Board are ex parte in nature and nonadversary. Parties to the hearing will be permitted to ask questions, including follow-up questions, of all witnesses but cross-examination will not be permitted. Proceedings will not be limited by legal rules of evidence, but reasonable bounds of relevancy and materiality will be maintained. (38 U.S.C. 4002)

§ 19.165 Rule 65; Witnesses.

(a) *General.* The testimony of witnesses will be heard. An appellant or a representative may arrange for the voluntary appearance of any witnesses he/she desires, but the Board will not require the appearance of any Veterans Administration official or other person. (38 U.S.C. 4002)

(b) *Testimony under oath.* All testimony must be given under oath unless excused because of religious principles or other good cause. If the witness declines to take an oath, he/she should be informed that the testimony will be permitted on affirmation. The witness should then be requested to make a solemn declaration as to the truth of the testimony about to be given. The witness may use such words as he/she considers binding on his/her conscience. Administration of the oath for the sole purpose of presenting contentions and argument is not required. (38 U.S.C 4002)

§ 19.168 Rule 68; Recorded hearing.

(a) *Board of Veterans Appeals.* The hearing proceedings before a Section of the Board shall be recorded and a tape of these proceedings shall be on file at the Board of Veterans Appeals. A written transcript or a copy of the tape may be furnished without cost to the appellant or representative if so requested at the time of or prior to the hearing; otherwise a charge may be made in accordance with § 1.577 of this title.

(b) *Field offices.* The hearing proceedings before field office personnel after the filing of a notice of disagreement shall be recorded and a copy of the complete transcript incorporated as a permanent part of the claims folder. A copy may be furnished without cost to the appellant or representative if so requested at the time of or prior to the hearing; otherwise a charge may be made in accordance with § 1.577 of this title. (38 U.S.C. 4002)

§ 19.177 Rule 77; Independent medical expert opinions.

When, in the judgment of the Board, additional medical opinion is warranted by the medical complexity or controversy involved in an appeal, the Board may obtain an advisory medical opinion from one or more medical experts who are not employees of the Veterans Administration. Opinions will be secured, as requested by the Chairman of the Board, from recognized medical schools, universities, clinics or medical institutions with which arrangements for such opinions have been made by the Administrator of Veterans Affairs. An appropriate official of the institution will select the individual expert(s) to give an opinion. (38 U.S.C. 4009)

§ 19.182 Rule 82; Remand for further development.

(a) *General.* When, during the course of review, it is determined that further evidence or clarification of the evidence or correction of a procedural defect is essential for a proper appellate decision, the section of the Board shall remand the case to the agency of original jurisdiction, specifying the further development to be undertaken. (38 U.S.C. 4002, 4004(a))

(b) *Review by agency of original jurisdiction.* Where the development results in additional evidence, a supplemental statement of the case will be furnished the appellant and any representative, and the records will again be reviewed by the agency of original jurisdiction. A supplemental statement of the case will not be required where the only purpose of the remand is to assemble records previously considered by the agency of original jurisdiction. If the case is remanded to cure a procedural defect, the Board may also require issuance of a supplemental statement of the case to assure full notification to the appellant of the status of the case. (38 U.S.C. 4005(d)(1)

(c) *Resubmission to Board of Veterans Appeals.* Unless the benefits at issue on appeal are awarded upon review by the agency of original jurisdiction, the records will be returned to the Board of Veterans Appeals for completion of appellate review. Remanded cases will not be closed for failure to respond to the supplemental statement of the case. (38 U.S.C. 4005(d))

RECONSIDERATION

§ 19.185 Rule 85; When reconsideration is accorded.

Reconsideration of an appellate decision may be accorded at any time by the Board of Veterans Appeals on request by the appellant or his/her representative or on the Board's own motion:

(a) Upon allegation of obvious error of fact or law; or

(b) Upon discovery of new and material evidence in the form of records or reports of the military, naval or air service department concerned or officially corrected service department record. (38 U.S.C. 4003, 4004(b))

§ 19.186 Rule 86; Filing and disposition of a motion for reconsideration.

(a) *Application requirements.* A motion for reconsideration shall set forth clearly and specifically the alleged obvious error(s) of fact or law in the decision of the Board or other appropriate basis for requesting reconsideration. This motion may be filed at any time. (38 U.S.C. 4003, 4008)

(b) *Disposition.* The Chairman or his/her designee will review the sufficiency of the allegations set forth in the motion.

(1) *Motion denied.* The appellant and representative will be notified if the motion is denied. The notification will be signed by the Chairman and will include reasons why the allegations are found insufficient. This constitutes final disposition of the motion.

(2) *Motion allowed.* If the motion is allowed, the Chairman or his/her designee will assign a reconsideration panel according to Rule 90 (§ 19.190). The appellant and representative will be so notified. At the time of notification the appellant and the representative will be given a period of 60 days to present additional arguments. (38 U.S.C. 4003, 4008)

§ 19.187 Rule 87; Evidence considered.

Reconsideration of an appellate decision for error shall be limited to review of the evidence of record at the time the decision was entered, but the Board may secure additional medical or legal opinion. Additional evidence, apart from service department records, submitted following the decision being reconsidered is subject to the provisions of Rule 94 (§ 19.194) concerning new and material evidence. (38 U.S.C. 4003, 4009)

APPENDIX I

SYNOPSIS OF CONGRESSIONAL FACTFINDING AND ENACTMENTS CONCERNING THE FEE LIMITATION

(This appendix will supplement Appendix E by illustrating the lack of congressional factfinding concerning the fee limitation, including the lack of fact finding concerning its application to the modern VA system for adjudicating SCDD claims.)

The fee limitation was first enacted on July 14, 1862. Abraham Lincoln was President and the Emancipation Proclamation had not yet been issued. The Civil War was being waged with swords, rifles, and cannonballs—Agent Orange and atomic weapons were still a century away. The fee limitation was part of a bill entitled "An Act to Grant Pensions," which authorized a fee of $5 for attorneys who helped veterans to execute the simple pension application. Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568. The purpose of the statute was to protect veterans from unscrupulous attorneys who were charging exorbitant fees for the purely clerical task of filling out the necessary forms. (*See* MA App. E).

During the next five decades, the fee limitation was re-enacted on several occasions as part of the recodification or revision of veterans' pension benefits. On such occasions, Congess contemplated that attorneys' services would consist solely of helping veterans to complete basic pension claim forms. Significantly, in amending the War Risk Insurance Program in 1918, Congress drew a distinction between the purely clerical function of completing pension claim forms and the more complex tasks performed by attorneys in litigated insurance claims. Thus, the act authorized payment of attorneys' fees equal to five percent of the amount recovered in litigated insurance cases, while it limited fees for assistance in filing pension claims to $3. Act of May 20, 1918, Pub. L. No. 151, 40 Stat. 555. Congressman Treadway explained the fee limitation:

> Mr. Treadway: May I call the gentleman's attention to the fact that there are two places where attorneys or claim agents are recognized? One is the preparation of the papers

> and the execution of necessary papers, where not to exceed $3 may be charged. That is simply a *clerical service.* Then, you will see the bill also recognizes attorneys in connection with a suit [in litigated insurance cases].

56 Cong. Rec. H5223 (daily ed. April 17, 1918) (emphasis added). Congressman Snook reiterated this point:

> Mr. Snook: Now, this bill is so drawn . . . that these attorneys cannot collect a fee for services in any one of these cases, except under regulations to be formulated and promulgated by the Bureau of War-Risk Insurance. It was suggested to the committee, however, that it might be necessary, and probably was necessary, that some compensation should be allowed to someone for preparing the papers for applicants, and so the fee for that purpose was fixed in the bill at $3.00. . . .
>
> Mr. Linthicum: The gentleman says "preparing papers"; that is merely filling up a blank.

56 Cong. Rec. H5223 (daily ed. April 17, 1918) (emphasis added). Similarly, the House Committee on Interstate and Foreign Commerce reported:

> As a fee for the preparation of papers which the bureau will send these people, the committee has fixed a maximum charge of $3, which we believe is ample for the work that will be necessitated in filling out these papers.

H.R. Rep. No. 471, 65th Cong., 2d Sess. 2 (1918).

In 1924, the fee limitation was raised from $3 to $10. World War Veterans' Act, Pub. L. No. 242, § 500, 43 Stat. 607, 628 (1924). The statute specifically applied to "preparation and execution of the necessary papers." Except to state the increase from $3 to $10, the committee reports and congressional debates did not mention the fee limitation. *See* H.R. Rep. Nos. 589, 763, S. Rep. No. 397, 68th Cong. 1st Sess. (1924). In 1925, the fee limitation for assistance in "preparation and execution of the necessary papers" was mechanically re-enacted as part of a recodification of existing veterans' law. Act of March 24, 1925, Pub. L. No. 628, § 500, 43 Stat. 1302, 1311. It was not mentioned in the report of the House Committee on World War Veterans

Legislation, H.R. Rep. No. 1518, 68th Cong., 2d Sess. (1925), nor in the Congressional debates. In fact, Congressman Browning stated of the bill, H.R. 12308, "The medical service is practically the only new thing in it. . . ." Cong. Rec. H5068 (daily ed. Feb. 18, 1925). In the final House debate, when asked "what is left" after the Senate amendments, Congressman Johnson explained:

> There are some administrative provisions that will perhaps be of some benefit like the interpleader in reference to the payment of reinsurance. There are some other elements of the bill that will be of benefit to the men who have been guilty of what is known as misconduct, but outside of those matters I think there is nothing.

Cong. Rec. H5454 (daily ed. March 3, 1925).

In 1936, the fee limitation was re-enacted as part of a recodification of existing veterans' law. Act of June 29, 1936, Pub. L. No. 844, § 201, 49 Stat. 2031, 2032. It was part of an act to "effect uniform provisions in laws administered by the Veterans' Administration . . . ." The sole mention of the fee limitation by the House Committee on World War Veterans Legislation was in its explanation that the purpose of the bill was to "codify, consolidate, and make uniform certain sections of present laws and regulations relating to the administration of benefits under the Veterans' Administration," including the fee limitation. H.R. Rep. No. 2899, 74th Cong., 2d Sess. 1-2 (1936). This statement, along with the rest of the House Committee's explanation for the bill, was excerpted in the report of the Senate Finance Committee, which made no other mention of the fee limitation. S. Rep. No. 2325, 74th Cong. 2d Sess. (1936). Again, the fee limitation was never mentioned in the congressional debates.

Significantly, no mention was made in Congress in 1936 of the great changes that had been made in veterans' compensation as part of President Roosevelt's New Deal. The VA had been created in 1930. Act of July 3, 1930, Pub. L. No. 536, § 1, 46 Stat. 1016. Then, in 1933, President Roosevelt made a number of changes which rendered the VA adjudication system much more complex. The basic entitlement to SCDD was created by Executive Order on June 6, 1933. *See* Exec. Order No. 6156 at 1. The presumption of sound condition was established by the same

Executive Order, as were rebuttable presumptions relating to certain diseases and disabilities. The complicated schedule of rates for different disabilities and combinations of disabilities was also established by Executive Order No. 6156. *See id.* at 3-4. The Executive Order also addressed aggravation of preexisting injuries or diseases. On June 28, 1933, President Roosevelt issued Executive Order No. 6230. It dealt with claim forms, effective dates of awards, effective dates of reductions and discontinuances, and payment of certain accrued benefits upon death of a beneficiary. Perhaps most importantly, Executive Order No. 6230 created the procedure of filing appeals and created the Board of Veterans Appeals to hear them. All of these changes in 1933 greatly complicated the SCDD claims procedure. This new complexity, not created by Congress, was never considered by Congress when it re-enacted the fee limitation in 1936 or thereafter.

In 1957 the fee limitation was re-enacted once again merely as part of a recodification of existing veterans' law intended to "consolidate into one Act, and to simplify and make more uniform, the laws administered by the Veterans' Administration relating to compensation, pension, hospitalization, and burial benefits, and to consolidate into one Act the laws pertaining to the administration of the laws administered by the Veterans' Administration." Veterans' Benefit Act of 1957, Pub. L. No. 85-86, § 1604, 71 Stat. 83, 140. The fee limitation was neither mentioned in any committee report nor debated by Congress. It was simply subsumed as one part of the existing body of veterans' law consolidated by the legislation. The House Committee on Veterans' Affairs explained that, as the bill's title stated, the purpose of the statute was "[t]o consolidate into one act, and to simplify and make more uniform" existing law. H.R. Rep. No. 279, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Ad. News 1214, 1214. The Committee did not mention the fee limitation in its explanation of the bill. Similarly, the Comptroller General stated that the purpose of the law was "to serve as a simplified restatement of existing law." *Id.* at 1224. Likewise, the Assistant Director of the Bureau of the Budget stated, "The intent of the bill is to simplify and embody in substance the existing provisions of law." *Id.* at 1240. The sole

reference to the fee limitation, in an attachment to the VA Administrator's statement, made clear that it was simply part of existing law and was not being reconsidered:

> The portion of this section which provides a penalty for one who "wrongfully withholds from any claimant or beneficiary any part of a benefit or claim allowed and due him" is apparently a restatement, in part, of section 202, Public No. 844, 74th Congress, which is not applicable to laws pertaining to Government life insurance.

Id. at 1237. The Senate Committee on Finance also reported on the bill. S. Rep. No. 332, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code & Ad. News 1241. Its report also stated that the purpose of the act was "to consolidate into one act, and to simplify and make more uniform," existing law. *Id.* at 1241. Except for the lone reference of the VA Administrator, *id.* at 1253, the Senate Committee report did not mention the fee limitation either.

Finally, on September 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105, was passed, which contains the fee limitation as it stands today. It maintained in section 784(g) a percentage allowance for litigated insurance cases. The act was entitled "An Act To consolidate into one Act all of the laws administered by the Veterans' Administration, and for other purposes." Like the 1957 legislation, it was simply another recodification of existing law. Again, the fee limitation was neither debated by Congress nor mentioned in any committee reports. It was simply subsumed as part of the existing body of veterans' law. The bill, H.R. 9700. was reported on by the Committee on Veterans Affairs. H.R. Rep. No. 1298, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 4352. The report explained that the bill "is basically a restatement of existing law." *Id.* at 4353. It did not mention the fee limitation. The bill was also reported on by the Senate Committee on Finance. S. Rep. No. 2259, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 4375. This report also stated that "[t]he bill is essentially a consolidation of all of the existing laws administered by the Veterans' Administration." *Id.* at 4375. It did not mention the fee limitation either.

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No. 84-571

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

HARRY N. WALTERS, Administrator of The Veterans Administration, et al.,

Appellants,

vs.

THE NATIONAL ASSOCIATION OF RADIATION SURVIVORS, a California non-profit corporation, et al.,

Appellees,

and AMERICAN G.I. FORUM, a national non-profit corporation,

Intervenor-Appellee.

Direct Appeal From The
United States District Court For
The Northern District Of California

BRIEF OF INTERVENOR-APPELLEE AMERICAN G.I. FORUM

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TABLE OF CONTENTS

Page

Table of Authorities..... ii

Appellee American G.I. Forum..... 1

Summary of Argument..... 3

Argument..... 5

A. Once permitting counsel, Congress cannot prohibit effective counsel..... 5

B. The record documents the inadequacy of service representatives and the quasi-adversarial nature of V.A. proceedings..... 6

C. In a free market, uncompensated service representatives would prevail over compensated attorneys, assuming the former were effective..... 9

D. Even non-adversarial proceedings require counsel to ensure due process..... 12

Conclusion..... 15

TABLE OF AUTHORITIES

Cases: Page

Bounds v. Smith, 430 U.S. 817 (1977)..... 13

Feres v. United States, 340 U.S. 135 (1950)..... 14

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 6

United Mineworkers v. Illinois Bar, 389 U.S. 217 (1967)..... 6

United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971)..... 6

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)..... 11

Younger v. Gilmore, 404 U.S. 15 (1971)..... 13

Statutes and Regulations:

38 U.S.C. 211(a)..... 14
38 U.S.C. 3311..... 8
38 U.S.C. 3404(c)..... 5

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APPELLEE AMERICAN G.I. FORUM

The American G.I. Forum is the nation's largest Hispanic veteran's organization. It has 424 chapters in 37 states, including every major state, and approximately 50,000 members.

The American G.I. Forum was founded

in 1946 in Corpus Christi, Texas as a result of discriminatory practices by the government and veterans' groups towards Hispanics; the specific incident precipitating its formation was the denial of equal burial rights to an Hispanic World War II veteran.

The American G.I. Forum's local and national activities on behalf of veterans depend entirely on volunteer staff. Even its national and statewide officers are uncompensated.

The American G.I. Forum offers no formal representation of veterans before the Veteran's Administration and believes that effective representation before the Veteran's Administration requires, at least in complex cases, fully compensated counsel.

Although the American G.I. Forum has no quarrel with veterans' organizations that provide service representation be-

fore the Veteran's Administration, it does not believe that its members or other veterans are adequately or effectively served in the absence of an opportunity to freely choose between uncompensated service representatives and compensated attorneys.

SUMMARY OF ARGUMENT

Appellee American G.I. Forum fully adopts the Statement Of The Case and the legal arguments presented by the primary appellees NARS, et al.

For the convenience of the court, and to avoid duplication, the American G.I. Forum presents its argument in highlight form. It contends that the free market, and its corollary, consumer free choice, rather than paternalism, is the key to protecting the due process and First Amendment rights of veterans before the V.A.

In summary, The American G.I. Forum contends that: a) the ten dollar attorneys fee limit in effect constitutes a total prohibition against effective counsel and an unwarranted and wholly unnecessary interference with the free market and consumer choice; b) the record demonstrates that veterans' service representatives, albeit dedicated, are inadequate and the V.A.'s system, manned by over 800 attorneys, is far more adversarial than non-adversarial; c) the V.A. procedures are more complex and arcane than most criminal and civil procedures in which attorneys are either guaranteed or permitted without restriction; d) if uncompensated service representatives are as skilled as the government contends, informed market choices will prevent compensated attorneys from representing veterans, thereby avoiding the dangers Congress was allegedly concerned about;

and e) except for veterans, no other class of Americans is systematically precluded from securing counsel.

ARGUMENT

A. Once Permitting Counsel, Congress Cannot Prohibit Effective Counsel.

Ten dollars, the maximum attorneys fee permitted by statute, 38 U.S.C. §3404(c), has such trivial purchasing power (estimated six minutes of attorney time)[1] that it is, in effect, a prohibition against representation by competent or effective counsel.[2]

Although it might be argued that Congress could make findings of fact that counsel is unnecessary, by definition the

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1 Based on an average hourly fee of $100 per hour.

2 Assuming a complex case takes 500 hours, ten dollars amounts to two cents per hour.

allowance of a fee, however trivial, is an implicit finding that counsel may be necessary. However, Congress, once so finding, would violate appellee's due process and First Amendment rights if it then legislated that effective counsel was prohibited. Goldberg v. Kelly, 397 U.S. 254 (1970), United Transportation Union v. Michigan Bar, 401 U.S. 576 (1971) and United Mineworkers v. Illinois Bar, 389 U.S. 217 (1967). In fact, the government's argument leads to the unconstitutional conclusion that counsel is permitted only so long as it is ineffective or incompetent.

B. The Record Documents The Inadequacy of Service Representatives and the Quasi-Adversarial Nature of V.A. Proceedings.

The government's euphoric and sanitized description of the V.A.'s alleged "non-adversarial" system is in conflict with the record below and is an elaborate

legal camouflage of a reality that no court, particularly this court, can or should ignore. Although 87 percent of claimants are represented by service representatives (J.A., 574), less than one percent (.9%) of all V.A. initial decisions are appealed (J.A., 387) and regarding the final appeal before the BVA, only four percent of the cases decided involve personal appearances. (R 73, Ex 70 at 81, J.A., 602-05).

No experience within the adversarial or bureaucratic system would argue on behalf of such a record. It is, for example, preposterous to assume the human infallibility implicit in a less than one percent appeal rate. It is similarly preposterous to assume that decision-makers are immune to personal argument as is implicit in the mere four percent appearance rate at BVA hearings. (J.A., 334)

Most damning to the government's argument regarding the adequacy of service representatives and the non-adversarial procedures of the V.A. in protecting the due process and First Amendment rights of SCDD claimants is the bottom line regarding complex cases. None of the more than six thousand Agent Orange cases (J.A., 519) and only one percent (15 of 2,000) of atomic radiation cases (J.A., 518) have been adjudicated in favor of the claimant.

The effectiveness of the V.A. itself is similarly questionable. For example, it rarely (one out of every ten thousand claims adjudicated) seeks advisory medical opinions and has almost never invoked its statutory power, 38 U.S.C. §3311, to subpoena documents (only five subpoenas issued since 1976 and most against the veteran), despite employing more than 800 attorneys within the adjudicative process

at issue. (R 86, Der. Aff. ¶2, J.S., App. A at 35a; V.A. Int. Ans. 21-22; J.A., 331-33)

The amicus curiae brief of the Disabled American Veterans in support of the United States fails to raise, much less explain why, if its service representatives are an adequate substitute for legal counsel: less than one percent of all cases are appealed, only one in ten thousand claims involve supporting medical documentation, records no matter how pertinent are never subpoenaed, and ninety-six percent of final appellate decisions occur without an oral hearing.

C. In a Free Market, Uncompensated Service Representatives Would Prevail Over Compensated Attorneys, Assuming the Former Were Effective.

The fear of the Disabled American Veterans that the availability of paid counsel will destroy it and service representatives is unfounded.

If service representatives are extraordinarily beneficial to veterans, as alleged by the DAV, the threat of compensated attorneys will have no adverse impact on its dominance. In a free market, given no other variables, veterans will obviously seek skilled uncompensated service representatives and shun well-paid lawyers of dubious skill and integrity. This is particularly so given the clear competitive advantages that service representatives have by dint of their long history and extensive network of veteran contacts and references. In fact, unless paid counsel are substantially and clearly more effective than service representatives, it is unlikely that veterans, particularly in the long-run, will choose to bring attorneys into the V.A. process. Ultimately, should appellees prevail, service organizations setting forth the relative

competitive merits to veterans of uncompensated versus compensated representatives would seem to offer the most protection to veterans.

The paternalism that underpins the government's interference in veterans' First Amendment rights is puzzling. It is contrary to the free market principles and consumer free choice philosophy upheld by this court, Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) and inconsistent with the spirit of the antitrust briefs filed by the Attorney General and Solicitor General in the federal courts during the last four years. Ironically, the government offers no justification for distinguishing between the need for paternalism here, where it is unwanted and the antitrust cases before this Court where the government urges a free

market even if the affected parties oppose such.

D. Even Non-Adversarial Proceedings Require Counsel to Ensure Due Process.

In an increasingly complex society, governed by increasingly obscure and changing statutes, regulations and informal codifications of procedures, it is a rare individual, even in a so-called non-adversarial system, who is better off without a skilled lawyer. This is particularly so when the class of persons, as herein, consists of a large number of non-high school graduates and few college graduates and, by definition, many who are physically and mentally disabled. (J.A., 146)

The compelling need for skilled counsel, even in a non-adversarial system, which the V.A. system surely is not, is illustrated by the recent experience of the present Attorney General. Faced

with a non-adversarial Special Counsel investigation of a relatively simple factual situation almost exclusively within his own knowledge, the Attorney General, apparently quite properly, sought expensive and nationally-renown counsel to represent his interests. The cost, which is likely to be borne by the taxpayers, was 72,000 times greater than the present maximum permitted to veterans who pursue V.A. claims.

In a judicial era where criminals are granted the right to counsel, Bounds v. Smith, 430 U.S. 817 (1977) and Younger v. Gilmore, 404 U.S. 15 (1971), and the poorest welfare recipient is permitted even in the simplest of cases to retain counsel in suits against the government, it is exceedingly difficult, if not impossible, to appreciate the rationale or justification for abridging the First and Fifth Amendment rights of those who

have sought to make those rights possible for all Americans. In fact, no class of Americans, except veterans, are systematically precluded from seeking legal counsel where important economic or personal rights are at stake.

Thus, as a result of veterans being barred from any judicial remedy under the Federal Torts Claim Act, Feres v. United States, 340 U.S. 135 (1950), and the absence of judicial review over V.A. decisions, 38 U.S.C. §211(a), the government has, in effect, imposed on veterans, and no other class of Americans, a uniquely oppressive unilateral "contract" that is far more onerous than the typical contract of adhesion used by insurance companies.

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CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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AMERICAN G.I. FORUM

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No. 84-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF THE VETERANS ADMINISTRATION, ET AL.,

Appellants,

—v.—

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.,

Appellees.

BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA IN SUPPORT OF APPELLEES

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491

TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES.....iii

INTEREST OF AMICI.....ix

INTRODUCTION AND SUMMARY OF ARGUMENT.....1

ARGUMENT.....4

I. The Government Misconceives the Relationship of the Individual to the State Embodied in the Due Process Clause of the Fifth Amendment.....4

A. Claimants Need Not Take "The Bitter With the Sweet." Rather, They Are Entitled to Constitutionally Adequate Procedures for Determining Eligibility for Benefits.....5

B. The Effective Exclusion of Attorneys from the Claims Process Violates Due Process.....9

II. The Government Misconceives the Roles of Congress and the Judiciary in Procedural Due Process Challenges to Congressional Enactments.....23

A. Courts Need Not Defer to Congressional "Findings" in a Procedural Due Process Challenge to an Administrative Scheme.....24

B. Deference to Congressional "Findings" in This Procedural Due Process Challenge Would Collapse the Analytical Framework Established in Mathews v. Eldridge.....33

CONCLUSION.....38

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967).....11

Ake v. Oklahoma, 53 U.S.L.W. 4179 (U.S. Feb. 26, 1985).....25

Arnett v. Kennedy, 416 U.S. 134 (1974).....7, 8

Boddie v. Connecticut, 401 U.S. 371 (1971).....6, 34

Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R., 393 U.S. 129 (1968).....29

Buckley v. Valeo, 424 U.S. 1 (1976).....25

Carey v. Population Services International, 431 U.S. 678 (1977).....17

Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961).....30

DeRodulfa v. United States, 461 F.2d 1240 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972).....12

Ex parte Virginia, 100 U.S. 339 (1880).....30

Faretta v. California, 422 U.S. 806 (1975).....17

Feres v. United States,
340 U.S. 135 (1950).....14

Ferguson v. Skrupa,
372 U.S. 726 (1963).....29

Fitzpatrick v. Bitzer,
427 U.S. 445 (1976).....30

Fuentes v. Shevin,
407 U.S. 67 (1972).....17

Fullilove v. Klutznick,
448 U.S. 448 (1980).....30

Gagnon v. Scarpelli,
411 U.S. 778 (1973).....18, 35

Garcia v. San Antonio Metropolitan
Transit Authority,
53 U.S.L.W. 4135
(U.S. Feb. 19, 1985).....24

Goldberg v. Kelly,
397 U.S. 254 (1970).....passim

Greenholtz v. Nebraska Prison
Inmates, 442 U.S. 1 (1979).....10

Gregory v. Town of Pittsfield,
53 U.S.L.W. 3616
(U.S. Feb. 26, 1985).....6

Hannah v. Larche,
363 U.S. 420 (1960).....33

Harris v. McRae,
448 U.S. 297 (1980).....29

Hudson v. Palmer,
82 L.Ed.2d 393 (1984).....13

INS v. Chadha,
77 L.Ed.2d 317 (1983).....25

In re Gault,
387 U.S. 1 (1967).....18

Ingraham v. Wright,
430 U.S. 651 (1977).....13

Johnson v. Robison,
415 U.S. 361 (1974).....12, 14

Joint Anti-Fascist Refugee
Committee v. McGrath,
341 U.S. 123 (1951).....33

Katzenbach v. Morgan,
384 U.S. 641 (1966).....30, 31

Kleppe v. New Mexico,
426 U.S. 529 (1976).....28

Korematsu v. United States,
323 U.S. 214 (1944).....28

Lassiter v. Department of Social
Services, 452 U.S. 18 (1981).....35

Little v. Streater,
452 U.S. 1 (1981).....8, 33, 34

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982).....6, 7, 8

Marbury v. Madison,
1 Cranch 137 (1803).....24

Mathews v. Eldridge,
424 U.S. 319 (1976).....passim

Middendorf v. Henry,
425 U.S. 25 (1976).....30

Morrissey v. Brewer,
408 U.S. 471 (1972).....9, 10, 33

Nebraska Press Ass'n v. Stuart,
427 U.S. 539 (1976).....28

New York Times Co. v. United States,
403 U.S. 713 (1971).....28

Oregon v. Mitchell,
400 U.S. 112 (1970).....30

Parratt v. Taylor,
451 U.S. 527 (1981).....13

Paul v. Davis,
424 U.S. 693 (1976).....13

Powell v. Alabama,
287 U.S. 45 (1932).....18

Radice v. New York,
264 U.S. 292 (1924).....29

Richardson v. Belcher,
404 U.S. 78 (1971).....9

Ross v. United States,
462 F.2d 618 (9th Cir.)(per curiam),
cert. denied, 409 U.S. 984 (1972).....12

Rostker v. Goldberg,
453 U.S. 57 (1981).....30

Ruckelshaus v. Monsanto,
81 L.Ed.2d 815 (1984).....28

Santosky v. Kramer,
455 U.S. 745 (1982).....25

Schweiker v. Wilson,
450 U.S. 221 (1981).....29

United States v. Klein,
80 U.S. (13 Wall.)
128 (1872).....32

United States v. Nixon,
418 U.S. 683 (1974).....26

Vance v. Bradley,
440 U.S. 93 (1979).....28, 29

Vitek v. Jones,
445 U.S. 480 (1980).....8, 25

Williamson v. Lee Optical Co.,
348 U.S. 483 (1955).....29

Wolff v. McDonnell,
418 U.S. 539 (1974).....8

Statutes

Administrative Procedure Act §§ 701-02,
5 U.S.C. §§ 701-02.....11

Federal Tort Claims Act,
28 U.S.C. §§ 2671-80.....13

38 U.S.C. § 211(a).....11

38 U.S.C. § 3404(c).....passim

42 U.S.C. § 405(g).....11

Other Material

Social Security Administration,
Office of Hearings and Appeals,
ALJ and Hearing Office Statistics,
FY 1983.....12

INTEREST OF AMICI

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 members, dedicated to preserving and protecting the fundamental liberties guaranteed in the Bill of Rights. The American Civil Liberties Union Foundation of Northern California is one of its state affiliates.

The American Civil Liberties Union has long worked to uphold the rights of individuals to the minimum procedural protections guaranteed by the due process clauses of the Constitution. With the consent of the parties, indicated by letters we have lodged with the Clerk of the Court, we file this brief amici curiae to bring our experience to bear on the important issues of due process and judicial review presented by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a challenge to a statute forbidding lawyers from charging more than $10 for representing a veteran seeking service-connected death and disability (SCDD) benefits from the Veterans Administration (VA). The statute has the effect of precluding veterans from retaining counsel in connection with disputes over service-related disability claims.

The government's defense of this de facto bar to retained counsel is premised on two disturbing conceptions of the relationship of the individual to the state that, if adopted by this Court, would work a jarring departure from accepted constitutional norms.

First, the government envisions a social welfare program in which the individual stands helpless before an omnipotent dispenser of governmental largesse. By

effectively excluding counsel, the government envisions a benefits determination process in which the individual veteran has no genuine opportunity to influence or challenge the premises of official decisionmaking. In fact, the effective exclusion of attorneys from the process only exacerbates the already unacceptably high risk of error in the Veteran's Administration disability determination process. SCDD claimants, who assert varying degrees of disability caused by injuries suffered in defense of our country, deserve better treatment from our government.

Second, the constricted vision of due process presented in the government's brief holds that "fundamental fairness" -- the touchstone of constitutional due process -- amounts to whatever the Congress and Executive Branch say it is. Moreover, the government proposes the remarkable notion

that the material facts of this litigation concerning procedural due process rights and First Amendment rights should be determined not by the courts, but by Congress. The government would have this Court make the delicate judgment whether the SCDD administrative system provides the minimum process that is due by examining the system as Congress intended it to operate rather than by examining the system as it actually operates today. Judicial deference to a congressional definition of due process in the abstract, divorced from facts and circumstances, which have informed this Court's modern procedural due process jurisprudence, would not only collapse the flexible balancing test now employed to make procedural due process determinations, but would also bring about an unwarranted shift in power away from the judicial branch to the legislative branch.[1]

ARGUMENT

I. The Government Misconceives the Relationship of the Individual to the State Embodied in the Due Process Clause of the Fifth Amendment.

The government's brief presents the anachronistic argument that Congress may, in establishing substantive criteria for public benefits, specify whatever procedures Congress deems adequate for determining which claimants fulfill the substantive criteria. U.S. Br. 32. The government's erroneous belief that Congress may burden statutorily created substantive rights with inadequate procedural protections has led the government to laud the qualities of the SCDD claims process as designed by Congress, rather than

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[1] Plaintiffs prevailed below on both their Fifth Amendment and First Amendment claims. Amici believe that they can be of most help to the Court by briefing the due process issue, on which the court below and the parties before this Court have focused. Amici's attention to due process in no way reflects our judgment on plaintiffs' First Amendment claims, which we believe are meritorious.

as it operates in the real world. The government thus improperly ignores the district court's detailed findings concerning the constitutional shortcomings of the SCDD process as measured by the traditional balancing test of Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

A. Claimants Need Not Take "The Bitter With the Sweet." Rather, They Are Entitled to Constitutionally Adequate Procedures for Determining Eligibility for Benefits.

The right to due process reflects the fundamental constitutional requirement that the government must abide by fair procedures in determining the rights and duties of individuals within our society. Within this framework, the authors of the Fifth Amendment

> recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable

> under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Boddie v. Connecticut, 401 U.S. 371, 375 (1971).

In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court reaffirmed the enduring principle that the due process clause protects an individual seeking a statutorily conferred benefit from having to accept whatever process a government agency deems sufficient.[2] In Logan, the state Fair Employment Practices Commission failed to schedule a timely hearing and thereby extinguished Logan's employment discrimination claim. This Court held that

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[2] Cf. Gregory v. Town of Pittsfield, 53 U.S.L.W. 3616, 3616-17 (U.S. Feb. 26, 1985) (O'Connor, J., dissenting) (due process protects applicant for general assistance from arbitrary denial).

Logan was not obliged to accept the agency's error as all the process he was due. Rather, the due process clause required the state to provide Logan with a meaningful hearing before the state could finally deprive him of his property interest. Id. at 434-37.

The government's conception of due process -- that Congress may determine what process is due in the administration of the VA claims system, U.S. Br. 33-43 -- is simply the discredited rights-privilege dichotomy in new clothing. The government reasons in part that because VA disability benefits are mere "gratuities" paid from a noncontributory fund, U.S. Br. 32, then the due process clause permits Congress to enact attendant conditions or procedures that force claimants to "take the bitter with the sweet." Arnett v. Kennedy, 416 U.S. 134, 153-54 (1974) (opinion of Rehnquist, J.).[3] But the Court has repeatedly rejected that approach, both

in Arnett itself[4] and in subsequent decisions as well. Logan v. Zimmerman Brush Co., 455 U.S. at 432; Vitek v. Jones, 445 U.S. 480, 490-91 n.6 (1980). Instead, this Court has held that the government may not establish criteria for granting substantive rights and then ignore the dictates of due process in establishing procedures for determining which claimants are entitled to those substantive rights. See Little v. Streater, 452 U.S. 1 (1981); Wolff v. McDonnell, 418 U.S. 539

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[3] The government does not quote these now-famous words from the Arnett plurality opinion, but the government does cite to the passage from that opinion that seeks to provide a legal justification for the aphorism. See U.S. Br. 32.

[4] The opinion in Arnett to which the government cites and from which the above quotation is drawn was signed by only three Justices. Six Justices rejected this approach and instead found that the government employee in that case had a property interest in continued employment and a constitutional right to a hearing. Arnett v. Kennedy, 416 U.S. at 166-67 (opinion of Powell, J., joined by Blackmun, J.); id. at 177-78 (opinion of White, J.); id. at 210-11 (opinion of Marshall, J., joined by Douglas, J., and Brennan, J.). Only four Justices, however, required a pre-termination hearing.

(1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Richardson v. Belcher, 404 U.S. 78, 81 (1971); Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970).

B. The Effective Exclusion of Attorneys from the Claims Process Violates Due Process.

The government's incorrect view that Congress may force the beneficiaries of its munificence to take "the bitter with the sweet" has led the government to defend the SCDD claims process by adverting to the scheme that Congress wished to create rather than to the scheme as it operates in practice. As such, the government's description of the claims process is not supported by the facts presented to the district court and does not inform this Court's traditional due process analysis, namely, a balancing of factors under Mathews v. Eldridge, supra. More specifically, the government's analysis does not take into

account the alarmingly high probability of error[5] and the lasting consequences of that error caused by the fee limitation's effective exclusion of claimants' attorneys from a process that is not subject to judicial review and has no alternatives.

The flexible requirements imposed by the due process clause of the Fifth Amendment vary depending upon the factual context. E.g., Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979); Morrissey v. Brewer, 408 U.S. at 481. Although this lawsuit challenges only the fee limitation statute,

[5] Risk of error forms the second part of the Mathews balancing test. The first and third parts examine, respectively, the private interest and the government interest. 424 U.S. at 335.

Of course, the Mathews test for determining what process is due comes into play only for an individual who possesses a protectible property interest. In the present case, the district court found, and the government does not now dispute, that SCDD claimants (including both initial claimants and those claimants threatened with termination of benefits) who fulfill the statutory criteria for benefits have a protectible property interest in those benefits. See Mathews v. Eldridge, 424 U.S. at 332; Goldberg v. Kelly, 397 U.S. 254, 261-62 (1970).

38 U.S.C. § 3404(c), a veteran applying for SCDD benefits finds himself hemmed in by several related rules that restrict the veteran's capacity to present his claim for compensation for his service-connected disabilites. The entire web of rules affecting the disabled veteran's relationship with the VA are relevant in resolving this due process challenge against the fee limitation statute.

First, even though judicial review of administrative decisionmaking is the norm, see, e.g., Abbott Laboratories v. Gardner, 387 U.S. 136, 141 (1967); §§ 701-02 of the Administrative Procedure Act, 5 U.S.C. §§ 701-02 (providing generally for judicial review of agency action); 42 U.S.C. § 405(g) (providing judicial review of Social Security disability determinations), the disability decisions of VA adjudicators are final. Judicial review is precluded by statute. 38

U.S.C. § 211(a).[6] The absence of judicial review heightens the importance of fairness in the administrative process itself. In Mathews v. Eldridge, the Court held that pre-termination hearings were not necessary to afford due process to Social Security disability claimants, in part because of

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[6] See Johnson v. Robison, 415 U.S. 361, 367 (1974) (§ 211(a) precludes review of "decisions of law or fact that arise in the administration by the [VA] of a statute providing benefits for veterans....") (original emphasis); Ross v. United States, 462 F.2d 618, 619 (9th Cir.) (per curiam), cert. denied, 409 U.S. 984 (1972); DeRodulfa v. United States, 461 F.2d 1240, 1258 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972).

The importance of judicial review as an error-correction mechanism is highlighted by the recent performance of federal courts in reviewing final Social Security disability decisions of the Secretary of Health and Human Services. Of the 10,618 appeals from benefits denials decided by federal district courts in Fiscal Year 1983, the courts reversed or remanded approximately two-thirds of the Secretary's decisions. See Social Security Administration, Office of Hearings and Appeals, ALJ and Hearing Office Statistics, FY 1983 at 25-26 (1,783 reversals; 5,198 remands). The recent performance of the Social Security Administration and the growing pressure on all sectors of the federal government to cut expenditures should make this Court wary of trusting the unreviewed administrative process to protect an individual claimant's interests.

their opportunity to present their cases in post-termination hearings and in appeals to federal district court. 424 U.S. at 349. By contrast, in the present case, no subsequent proceedings soften the impact of the lawyerless claims procedure.

Second, although in other contexts this Court has held that the availability of a tort remedy may provide all of the process that is due following the deprivation of a property or liberty interest, e.g., Hudson v. Palmer, 82 L.Ed.2d 393, 407-08 (1984); Parratt v. Taylor, 451 U.S. 527, 542-43 (1981); Ingraham v. Wright, 430 U.S. 651, 676-78, 682 (1977); Paul v. Davis, 424 U.S. 693, 711-12 (1976), no possibility exists for a disabled veteran to pursue his claim for compensation through a tort claim, because the Feres doctrine bars suit against the federal government under the Federal Tort Claims Act (FTCA), 28 U.S.C §§ 2671-80, for

injuries arising out of military service. Feres v. United States, 340 U.S. 135 (1950).

Third, even though the statutory preclusion of judicial review does not prevent plaintiffs from bringing constitutional challenges in federal court against elements of the SCDD statutory scheme, see Johnson v. Robison, 415 U.S. at 366-74, the fee limitation effectively prevents claimants from consulting attorneys concerning any aspect of a disability claim. Claimants are therefore unlikely to know whether they have potential constitutional claims that could be brought in federal court.

The SCDD process, therefore, has none of the usual safety valves generally attached to administrative processes designed to give content to participatory values and diminish the likelihood or consequences of bureaucratic error. It is against this

background of sharply limited alternatives that this Court should determine the fundamental fairness of the de facto exclusion of retained counsel from the administrative process.

Here, as in Goldberg v. Kelly, claimants do not assert a right to have appointed counsel to assist them in presenting their claims for benefits. Rather, plaintiff individuals and groups assert merely "that the [SCDD claimant] must be allowed to retain an attorney if he so desires." Goldberg v. Kelly, 397 U.S. at 270. The advantages for the welfare recipient represented by counsel at a welfare benefits hearing apply with full force to the SCDD claimant: "Counsel can help delineate the issues, present the factual contentions in an orderly manner, ... and generally safeguard the interests of the [claimant]. We do not anticipate that this assistance will unduly prolong or otherwise

encumber the hearing." Id. at 270-71. The government's wish to exclude attorneys from the SCDD process to maintain its "nonadversarial" nature has the inevitable effect of handicapping all but the most intelligent and well-organized claimants in their attempts to make cogent factual and legal presentations to the VA. The supposed goal of keeping the system nonadversarial thus serves the VA's administrative convenience by limiting the information presented to VA adjudicators and permitting the VA to control the decisionmaking apparatus without "interference" from attorneys. The exclusion of attorneys may promote administrative efficiency, but the latter has never been considered sufficient to justify a rule that so severely disadvantages a claimant in his attempt to prove his eligibility for public benefits. See Goldberg v. Kelly, 397 U.S. at 265-66;

cf. Carey v. Population Services International, 431 U.S. 678, 691 (1977) (ease of enforcement does not justify invasion of fundamental constitutional rights). In fact, the very conception of the due process clause is premised on the realization that the government simply cannot be trusted to decide important questions affecting the individual without subjecting itself to a process which assures the individual a meaningful opportunity to participate in the decisional process and to question the correctness of the government's assumptions. See Fuentes v. Shevin, 407 U.S. 67, 81 (1972).[7]

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[7] Even beyond the practical disadvantages suffered by a lawyerless claimant, exclusion of lawyers from the system may well create an appearance of injustice that tarnishes the legitimacy of the disability claims process. Just as forcing a lawyer on an unwilling criminal defendant "can only lead him to believe that the law contrives against him," Faretta v. California, 422 U.S. 806, 834 (1975), so preventing a lawyer from representing a willing SCDD claimant can only lead the claimant to doubt the integrity of the process.

As a fundamental premise, this Court has long recognized that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." Goldberg v. Kelly, 397 U.S. at 270 (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)); see Gagnon v. Scarpelli, 411 U.S. 778, 786-87 (1973); In re Gault, 387 U.S. 1, 34-41 (1967). Even in the face of the foregoing axiom, the government concedes that the purpose and effect of the fee limitation statute is to exclude attorneys from the entire SCDD eligibility determination process. U.S. Br. 30-31.

The disadvantages suffered by the lawyerless claimant take many forms. As the district court's extensive findings clearly demonstrate, although the SCDD adjudicatory system may be informal and nonadversarial in theory, it is complex, chaotic, and error-prone in operation. Whatever the substance

and procedure of the VA disability claims system when Congress first enacted the fee limitation, claimants without legal counsel now face a bewildering variety of procedural traps, 589 F. Supp. at 1319, a diverse array of guiding precedents scattered in many sources (some unreported), id., regular attempts by the VA to induce claimants to waive their right to a hearing, id. at 1321, and complex substantive issues, id. at 1319-20.[8]

The government contends that despite the hurdles confronting a SCDD claimant, the non-legal representation offered by various veterans organizations provides claimants with effective advocates. However, as part of the present as-applied challenge,

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[8] Proving that a current disability was caused by a service-connected injury is especially difficult for certain modern causes as the toxic herbicide Agent Orange, atomic radiation, and post-traumatic stress syndrome. 589 F. Supp. at 1320.

plaintiffs adduced detailed, uncontroverted evidence of the inadequacies of the service organizations' representatives as substitutes for attorneys. The district court found that despite the best of intentions, the lay representatives lacked many critical skills and were "severely overburdened" by their caseloads. Id. at 1321-22.[9] The court similarly found that despite regulations requiring VA personnel to aid veterans in presentation of their claims, the VA's limited resources made such aid illusory. Id. at 1320-21.

This Court's decision in Goldberg v. Kelly sweeps away the government's contentions that service organization representatives and VA personnel provide

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[9] The consequences for judicial review of accepting the government's argument that the district court should not have considered evidence concerning the actual performance of service organization representatives, as well as other aspects of the SCDD process, are addressed in Part II infra.

sufficient support to the VA disability claimant in preparing and presenting his case. The welfare recipients in Goldberg v. Kelly were able to present their positions to agency adjudicators in part through welfare caseworkers. The Court found that the advocacy provided by the caseworkers left recipients without an effective voice. A recipient and caseworker, acting together, could generally not match a lawyer's ability to "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient," 397 U.S. at 270-71. Moreover, the caseworkers had conflicting interests in that they had gathered the facts on which the government's claim of ineligibility rested. Id. at 269. In the present case, VA adjudicators, who are employed by the agency that must pay benefits to any claimant deemed eligible, seek

simultaneously to play the disparate and often conflicting roles of advocate and decisionmaker.

Given the complexity of SCDD substance and procedure, the lack of judicial review or a tort remedy against the government, and the unintended shortcomings of VA personnel and service organization representatives, the government's picture of a benign, informal, nonadversarial system that works for claimants takes on a nightmarish air of unreality. Amici offer no criticism of Congress' initial desire to simplify the veterans' disability claims process. We simply contend that the complexity of the current decisional process is such that retained counsel is often essential to a veteran seeking to vindicate his or her most important property right. The due process clause does not permit a well-intentioned, but lumbering and error-prone bureaucracy

beset with personnel shortages and budgetary pressures to deprive claimants of critical property interests without giving claimants a meaningful opportunity to be heard. Eliminating the $10 fee limitation, thereby allowing claimants to be represented by counsel, would provide that opportunity and restore a modicum of fairness to the SCDD benefits process.

II. The Government Misconceives the Roles of Congress and the Judiciary in Procedural Due Process Challenges to Congressional Enactments.

The government would have this Court ignore the district court's findings based on detailed evidence demonstrating the fundamental unfairness of the SCDD claims process in practice. The government would instead have this Court defer to congressional "findings" concerning the purpose and impact of the fee limitation on the SCDD process. The government's position,

if accepted, not only would eliminate the heretofore accepted institutional obligation of the courts to make independent factual assessments in procedural due process cases, but would also collapse the due process analytical framework of Mathews v. Eldridge by requiring deference to the government's interests, as expressed in congressional findings, without consideration of individual interests and the risk of error under current procedures.

A. Courts Need Not Defer to Congressional "Findings" in a Procedural Due Process Challenge to an Administrative Scheme.

At least since Marbury v. Madison, 1 Cranch 137 (1803), the federal judiciary has exercised the power to review acts of Congress for compliance with constitutional standards.[10] While congressional enactments

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[10] See Garcia v. San Antonio Metropolitan Transit Authority, 53 U.S.L.W. 4135, 4145 (U.S. Feb. 19, 1985) (Powell, J., dissenting).

usually arrive at this Court with a presumption of constitutionality, see INS v. Chadha, 77 L.Ed.2d 317, 340 (1983), based in part on the respect due a coordinate branch of government whose members, like members of the judiciary, have taken an oath to uphold the Constitution, this Court has ultimate authority to determine whether a federal statute is constitutional. Id. at 338-39 & n.13; Buckley v. Valeo, 424 U.S. 1 (1976). Just as proper respect for the values of federalism has not led this Court to abdicate its responsibility to determine what process is due under the Fourteenth Amendment, e.g., Ake v. Oklahoma, 53 U.S.L.W. 4179 (U.S. Feb. 26, 1985); Santosky v. Kramer, 455 U.S. 745, 755 (1982); Vitek v. Jones, 445 U.S. at 491, so respect for the powers of a coordinate branch of the national government should not lead this Court to abdicate its responsibility to determine what process is

due under the Fifth Amendment. E.g., United States v. Nixon, 418 U.S. 683, 713 (1974) (requirements of Fifth Amendment due process override claim of executive privilege).

The government argues here that the Court must defer to congressional findings underlying the enactment and retention of the fee limitation statute, 38 U.S.C. § 3404(c). The government would have this Court ignore the district court's findings that the VA disability claims process does not match Congress' idealized version of an informal and nonadversarial system.[11] The district court found that in many respects

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[11] Thus, the heart of the government's due process argument, U.S. Br. 33-43, brushes aside the extensive record below by asserting that "Congress has determined that the VA claims system operates in a fair and nonadversarial manner, and the district court improperly failed to defer to that congressional determination." See also U.S. Br. 35 n.35 ("it was inappropriate for the district court to conduct an evidentiary proceeding in the circumstancer presented here"); U.S. Br. 22 ("the factual proceedings in the district court are irrelevant to a proper disposition of this case").

the statutorily compelled lack of an attorney rendered veterans unable to present their claims adequately and therefore greatly increased the risk of erroneous deprivations of benefits. 589 F. Supp. at 1315-23. The government understandably wishes to avoid both the district court's detailed findings and plaintiffs' compelling evidence concerning the actual operation of the SCDD claims process. But this Court's cases provide no support for the government's radical approach, which reads into cases decided under many different constitutional provisions and in widely varying factual contexts an overarching principle that courts must defer to congressional "findings" in reviewing the constitutionality of congressional legislation.

A proper reading of the diverse cases cited by the government reveals that the deference due Congress in judicial review of

a congressional enactment depends on the constitutional provision at stake and the nature of the statute under attack.[12]

The cases cited by the government involved specific reasons for deference not present in this case.[13] The goverment principally relies on cases involving: equal protection challenges where no suspect classifications, quasi-suspect

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[12] For instance, a statute containing an explicit racial classification or burdening First Amendment freedoms would come before this Court with a heavy burden of justification. E.g., Korematsu v. United States, 323 U.S. 214, 216 (1944); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam); Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556-62 (1976). By contrast, a statute setting an age for mandatory retirement from the Foreign Service would warrant substantial deference from this Court to Congress. E.g., Vance v. Bradley, 440 U.S. 93, 97, 111 (1979).

[13] Compare Ruckelshaus v. Monsanto, 81 L.Ed.2d 815, 840 n.18 (1984) ("rational relationship" rest in Fifth Amendment takings context), and Kleppe v. New Mexico, 426 U.S. 529, 541 n.10 (1976) (deference to congressional authority under property clause of Art. IV, § 3 to protect wildlife on federal lands), with U.S. Br. 35 n.36 (citing Monsanto and Kleppe for principle of general deference to Congress).

classifications, or fundamental rights were at stake;[14] substantive due process challenges to statutes not affecting fundamental rights;[15] congressional action

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[14] See, e.g., Harris v. McRae, 448 U.S. 297, 322-25 (1980) (weighing competing interests under equal protection "rational relationship" test is congressional, not judicial, function); Vance v. Bradley, 440 U.S. at 111-12; see also Schweiker v. Wilson, 450 U.S. 221, 230 (1981).

In Vance v. Bradley, supra, from which the government has drawn a quotation concerning the need for judicial deference to Congress, U.S. Br. 35, this Court held that a mandatory retirement age for Foreign Service personnel did not violate the equal protection component of the Fifth Amendment due process clause, because the statute was rationally related to legitimate governmental goals. The Court explicitly limited its comments concerning deference to the context of "an equal protection case of this type." 440 U.S. at 111. An equal protection challenge on "rational relation" grounds looks not to actual facts but to whether Congress could have rationally concluded that certain facts were true. A procedural due process challenge, by contrast, entails a flexible balancing test that is sensitive to the facts and circumstances of the particular case. See infra, pp. 33-37.

[15] E.g., Brotherhood of Locomotive Firemen & Enginemen v. Chicago, R.I. & P.R.R., 393 U.S. 129, 138-39 (1968); Radice v. New York, 264 U.S. 292, 294 (1924); see also Ferguson v. Skrupa, 372 U.S. 726, 730-32 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

pursuant to its constitutional authority and relative institutional competence to legislate in the area of national security and military affairs;[16] and congressional action under the authority of Section Five of the Fourteenth Amendment.[17]

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[16] E.g., Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (military draft); Middendorf v. Henry, 425 U.S. 25, 43 (1976) (summary courts martial); Communist Party v. Subversive Activities Control Board, 367 U.S. 1, 94-97 (1961) (protection of nation against foreign dangers).

In upholding male-only draft registration against a Fifth Amendment equal protection challenge in Rostker, this Court noted that Congress deserved added deference in cases in which it had specifically considered the constitutionality of a statute before enacting it. 453 U.S. at 64. The government has made no showing in the present case that Congress has given serious consideration to the constitutionality of the fee limitation statute.

[17] E.g., Fullilove v. Klutznick, 448 U.S. 448 (1980); Oregon v. Mitchell, 400 U.S. 112 (1970). However, this Court has held on many occasions that Section Five confers on Congress an additional grant of authority to enforce the substantive provisions of the Fourteenth Amendment. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445, 455-56 (1976); Katzenbach v. Morgan, 384 US. 641, 651 (1966); Ex parte Virginia, 100 U.S. 339, 25 L.Ed. 676, 680 (1880). When Congress acts under Section Five, its enactments pass
[cont'd. on next pg]

In procedural due process cases, by contrast, deference to Congress is inconsistent with the Court's obligation to examine the facts and circumstances in making a context-specific determination. The flexible balancing test that has served as this Court's framework in resolving procedural due process challenges, see Mathews v. Eldridge, 424 U.S. at 335, envisions a far more active institutional role for courts than the government would admit. In Mathews, for example, the Court held that post-termination hearings for Social Security disability claimants satisfied due process not because that was the only process Congress provided, but rather because the Court determined that the

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constitutional muster so long as this Court determines that Congress could rationally have determined that the challenged provisions were appropriate methods for securing the guarantees of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. at 651. The VA fee limitation statute was of course not enacted under Congress's Section Five power.

Constitution did not require pre-termination hearings. The Court reached this conclusion only after thorough consideration of the facts concerning the actual operation of the Social Security disability claims process. See id. at 342, 345-47.

The government's view misconceives the role of judicial review by seeking to strip the courts of the power to find the adjudicatory facts on which constitutional decisionmaking depends. When general questions of legislative fact or "social fact" are at issue as they are in many equal protection and substantive due process cases, it may well be appropriate to defer to the legislature. However, when the adjudication of a case or controversy requires context-specific fact-finding, it has been clear, at least since United States v. Klein, 80 U.S. (13 Wall.) 128 (1872), that the proper performance of the judicial function requires independent judicial resolution of the facts.

B. Deference to Congressional "Findings" in This Procedural Due Process Challenge Would Collapse the Analytical Framework Established in Mathews v. Eldridge

This Court has repeatedly held that the procedural requirements mandated by the due process clause are flexible and vary according to the facts and circumstances of the particular case. See, e.g., Little v. Streater, 452 U.S. at 5 ("Due process, 'unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.'") (quoting Joint Anti-Fascist Refugee Committee v.McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring)); Mathews v. Eldridge, 424 U.S. at 334; Morrissey v. Brewer, 408 U.S. at 481; Hannah v. Larche, 363 U.S. 420, 442 (1960).

Where, as here, plaintiffs challenge a statute "as applied," courts must consider the evidence presented by the parties to

inform the constitutional inquiry. "'[A] statute ... may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of [legislative] power is beyond question.'" Little v. Streater, 452 U.S. at 16 (quoting Boddie v. Connecticut, 401 U.S. at 379).

For instance, a filing fee required to obtain a divorce, while "valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard." Boddie v. Connecticut, 401 U.S. at 380. The Boddie Court did not examine the Connecticut filing fee requirement in the abstract or as the state legislature had intended the fee requirement to operate, but rather as it actually affected female welfare recipients residing in Connecticut. Indeed, in Lassiter v. Department of Social Services,

452 U.S. 18, 31-32 (1981), this Court declined to set general due process guidelines for determining when provision of counsel is necessary in a parental status termination proceeding. Instead, this Court left that question to be answered by trial courts on a case-by-case basis (subject to appellate review). See also Gagnon v. Scarpelli, 411 U.S. at 790 (case-by-case determination of right to counsel at probation revocation hearings).

Given the highly fact-bound nature of procedural due process determinations, the government's contention that courts should refrain from receiving evidence as to the real-world impact of a congressionally mandated procedure is wholly inappropriate. The government's position, if accepted, would work a radical departure from the framework consistently used by this Court in procedural due process cases. Under the three-part test

set out in Mathews v. Eldridge, a court must examine: the individual interest that will be affected by official action; the risk of an erroneous deprivation and the probable value of additional or substitute procedural safeguards; and the government's interest. 424 U.S. at 335.

The government would collapse the Mathews balancing test by requiring courts to defer to the government's interest, as expressed by Congress in the statutory scheme establishing the challenged procedures. The first two elements of the Mathews test -- individual interest and risk of error -- would thus be eclipsed by the government's interest, and the balancing envisioned by Mathews would become a sterile exercise with a predetermined result in every case.

In a due process challenge, once a court has determined that a protectible interest does exist, the court's focus properly shifts

away from the legislative creation of the protectible interest to a determination of whether the procedures conferred by the legislature afford the minimum procedural protections required by the due process clause. This latter determination -- ascertaining what process is due -- is one that courts are uniquely qualified to make.

The district court in this case undertook a thorough balancing of the Mathews factors based on an extensive record. The evidence clearly supports the district court's factual findings and resulting legal conclusion that the fee limitation violates due process.

CONCLUSION

The judgment of the district court should be affirmed.

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No. 84-571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, *et al.*,
Appellants,

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of California

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BRIEF *AMICUS CURIAE* OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF APPELLEES

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43pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE FEE LIMITATION DENIES VETERANS PROCEDURAL DUE PROCESS BY FORECLOSING ACCESS TO COUNSEL OF THEIR CHOICE IN VA CLAIMS PROCEEDINGS	6
A. Veterans Have a Compelling Interest in Being Represented by Counsel of Their Choice in VA Claims Adjudication	9
1. Lawyers Can Assist Veterans in Making Crucial Strategic Decisions	14
2. Lawyers Can Assure that Information Is Developed in a Manner that Will Maximize the Veteran's Chance of Prevailing on His Claim	16
3. Veterans Need the Assistance of Lawyers in Resolving the Substantive Legal Issues that Frequently Arise in VA Proceedings	17
4. The Assistance of Lawyers Is Often Required in Order to Produce Effective Briefs and in Order to Guarantee Effective Oral Advocacy	20
B. The Government's Claimed Interest in Retaining the Fee Limitation Is Insubstantial	21

TABLE OF CONTENTS—Continued

	Page
II. THE FEE LIMITATION INFRINGES ON VETERANS' FIRST AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION AND THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES	25
A. The Fee Limitation Violates the First Amendment by Denying Veterans the Advocates of Their Choice	25
B. The Fee Limitation Restricts Veterans' Access to Information that Is Vital to Their Interests	27
CONCLUSION	30
APPENDIX	
POSITION DESCRIPTION FOR ATTORNEY-ADVISER (GS-11) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 2, 1982	1a
POSITION DESCRIPTION FOR ATTORNEY-ADVISER (GS-13) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 11, 1982	2a
POSITION DESCRIPTION FOR SENIOR ATTORNEY-ADVISER (GS-14) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, JUNE 10, 1983	4a

TABLE OF AUTHORITIES

CASES	Page
Bates v. State Bar, 433 U.S. 350 (1977)	27
Baxter v. Palmigiano, 425 U.S. 308 (1976)	24
Board of [illegible]gents of State Colleges v. Roth, 408 U.S. 5[illegible]972)	10
Buckley v. Valeo, 424 U.S. 1 (1976)	26
Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 367 U.S. 886 (1961)	9
Chappell v. Wallace, 103 S. Ct. 2362 (1983)	14
Friedman v. United States, 310 F.2d 381 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963)	28
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	24
Gemsco, Inc. v. Walling, 324 U.S. 244 (1945)	22
Gideon v. Wainwright, 372 U.S. 335 (1963)	6
Goldberg v. Kelly, 397 U.S. 254 (1970)	6, 10, 13, 21
Harmon v. Brucker, 355 U.S. 579 (1958)	15
Lassiter v. Department of Social Services, 452 U.S. 18 (1981)	9
Martin v. Lauer, 686 F.2d 24 (D.C. Cir. 1982)	27
Mathews v. Eldridge, 424 U.S. 319 (1976)	6
McKelvey v. Walters, 596 F. Supp. 1317 (D.D.C. 1984)	20
Middendorf v. Henry, 425 U.S. 25 (1976)	24
NAACP v. Button, 371 U.S. 415 (1963)	27
Peed v. Cleland, 516 F. Supp. 469 (D. Md. 1981)	20
Powell v. Alabama, 287 U.S. 45 (1932)	21
Powell v. McCormack, 395 U.S. 486 (1969)	22
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	22
Tinch v. Walters, 573 F. Supp. 346 (E.D. Tenn. 1983), *appeals docketed*, Nos. 83-5926 & 83-5955 (6th Cir., filed Dec. 12, 1983)	20
United States v. Brandon, 584 F. Supp. 803 (W.D. N.C. 1984)	29
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	27
Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)	30
Walters v. Secretary of Defense, 725 F.2d 107 (D.C. Cir. 1983)	15

TABLE OF AUTHORITIES—Continued

	Page
Wolff v. McDonnell, 418 U.S. 539 (1974)	24
Yagjian v. Marsh, 571 F. Supp. 698 (D.N.H. 1983)	14, 15, 16
STATUTES	
10 U.S.C. §§ 1201-1221 (1982)	28
10 U.S.C. § 1552 (1982)	14, 15
10 U.S.C. § 1553 (1982)	15
10 U.S.C. §§ 1552-1553 (1982)	28
26 U.S.C. § 501(a) (1982)	1
26 U.S.C. § 501(c)(19) (1982)	1
38 U.S.C. § 101(2) (1982)	18
38 U.S.C. § 211(a) (1982)	10
38 U.S.C. § 331 (1982)	17
38 U.S.C. § 351 (1982)	28
38 U.S.C. §§ 3104-3106 (1982)	29
38 U.S.C. § 3404(a) (1982)	7
38 U.S.C. § 3404(c) (1982)	4
38 U.S.C. § 4004(c) (1982)	12
REGULATIONS	
38 C.F.R. § 3.1(n) (1984)	18
38 C.F.R. § 3.12 (1984)	15
38 C.F.R. § 3.12(c)(6) (1984)	19
38 C.F.R. § 3.12(c)(6)(iii) (1984)	19
38 C.F.R. § 3.102 (1984)	19, 25
38 C.F.R. § 3.103(d) (1984)	7
38 C.F.R. § 3.156 (1984)	19
38 C.F.R. § 14.628(c) (1984)	2
38 C.F.R. § 14.628(d)(4) (1984)	2
38 C.F.R. § 19.150 (1984)	7
38 C.F.R. § 19.165 (1984)	21
LEGISLATIVE MATERIALS	
S. Rep. No. 178, 96th Cong., 1st Sess. (1979)	20, 21
S. Rep. No. 466, 97th Cong., 2d Sess. (1982)	22, 23
MISCELLANEOUS	
Carrington, *The Right to Zealous Counsel*, 1979 Duke L.J. 1291 (1979)	25

TABLE OF AUTHORITIES—Continued

	Page
I Legal Services Corp., Special Legal Problems and Problems of Access to Legal Services of Veterans, Native Americans, A Report to Congress as Required by § 1007(h) of the Legal Services Corp. Act of 1974, as amended (1980)	11, 16
Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 Cornell L. Rev. 989 (1977)	11
1983 Veterans Administration Annual Report	12
Wellen, *Armed Forces Disability Benefits—A Lawyer's View*, 27 JAG J. 485 (1974)	29

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Appellees.

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---

BRIEF *AMICUS CURIAE* OF VIETNAM VETERANS OF AMERICA IN SUPPORT OF APPELLEES

INTEREST OF *AMICUS CURIAE* [1]

Vietnam Veterans of America ("VVA") is the largest national organization devoted exclusively to serving the interests and addressing the concerns of veterans who served in the United States military during the Vietnam era. VVA is a nonprofit veterans organization incorporated in New York in 1978 and exempt from federal income taxation pursuant to 26 U.S.C. §§ 501(a) & 501(c)(19) (1982). It has nearly 20,000 members, with

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[1] Pursuant to Rule 36 of the Supreme Court Rules, written consent to file this brief has been obtained from counsel of record for all parties. The letters of consent have been filed with the Clerk of the Court.

165 chapters located in 38 states, the District of Columbia, and Puerto Rico. Membership is restricted to those who served on active duty during the Vietnam era (August 5, 1964 to May 7, 1975).

VVA was created to foster and promote improvement in the economic, social, physical and educational welfare of Vietnam veterans. As one means of furthering this goal, in 1981 VVA applied for and received recognition by the Veterans Administration ("VA") to represent claimants for benefits before that agency.[2]

Before forming its program for representing veterans before the VA, VVA reviewed the service programs used by the other veterans service organizations recognized by the VA. VVA found that these organizations have chosen to rely primarily upon individuals who are neither lawyers nor trained by lawyers to provide claims assistance. For reasons discussed below, VVA rejected this model. VVA instead developed a program in which all veterans are represented before the Board of Veterans Appeals ("BVA") by a lawyer or a law student supervised at all stages by a lawyer.[3]

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[2] This recognition was granted pursuant to 38 C.F.R. § 14.628(c) (1984). In order for an organization to receive this recognition, the VA must determine that the organizational applicant is "primarily involved in delivering services connected with either title 38, United States Code benefits and programs or other Federal and State programs designed to assist veterans." *Id.* Contrary to the assertion of *amicus curiae* Disabled American Veterans ("DAV"), DAV Br. at 22, VA regulations do *not* require organizations recognized by the VA to represent all veterans who request representation. *See* 38 C.F.R. § 14.628(d)(4). Nonetheless, VVA attempts to provide representation to all those who request it.

[3] Because VVA has been unable to find enough attorneys willing to represent veterans at the lower levels of the agency, i.e., at the VA regional office level, VVA has had to rely on many individuals without formal legal training ("service representatives") to represent claimants at the regional office level. Although VVA would prefer to provide lawyer representation at all levels of the agency, VVA believes it is appropriate, given its limited resources, to provide lawyers before the BVA because the BVA provides *de novo* review of a veteran's claim and is the final level of review within the agency.

To implement its program of lawyer representation, VVA entered into a contract with a law school clinical program which uses salaried attorneys and law students to represent claimants without charging the veteran a fee. VVA has also organized a panel of volunteer attorneys willing to represent veterans on an *ad hoc* basis without charge. In addition, VVA hired its own staff attorneys to monitor its service program and supplement the legal services provided by the law school clinical program and volunteer attorneys. In October 1983, VVA's salaried staff attorneys published a 640-page "Service Representatives Manual," supplemented by a bi-monthly veterans law newsletter, as a guide to all of VVA's accredited representatives providing legal services before all levels of the VA and other federal agencies involved in veterans law. VVA's legal staff also trains VVA's service representatives in legal advocacy skills and in the various substantive areas of veterans law.

VVA chose to emphasize lawyer representatation for a combination of reasons, including (1) the special skills and knowledge generally possessed by individuals with formal legal training and experience as practicing lawyers; (2) the inherently legal nature of the benefit programs administered by the VA and the VA adjudicatory system itself; (3) the often complex interrelationship between VA benefits claims and other substantive areas of veterans law; and (4) the involvement of VVA's legal staff in pursuing VVA's national policies to promote the interests and enhance the rights of Vietnam veterans. VVA believes that its decision to provide lawyer representation before the BVA has benefited the veterans VVA has served. And because VVA believes that veterans who do not have access to free legal representation, or who for their own reasons choose not to be represented by a serv-

ice organization, should be able to hire counsel of their choice, VVA strongly supports appellees in seeking to overturn the fee limitation contained in 38 U.S.C. § 3404(c) (1982).

VVA is also participating in this proceeding because it believes that the Court should be aware that the fee limitation has inhibited the development of a private bar with expertise in veterans law. VA benefits adjudication is only one of several interrelated areas which together form the field of veterans law. Veterans' legal rights are also affected by the laws governing discharge upgrading, correction of military records, and service department physical disability retirement compensation, among others. As in other fields, special training and experience are required to develop an expertise in the various interrelated areas of veterans law. It is VVA's perception that, owing in large measure to the fee limitation, members of the private bar have been discouraged from developing an expertise in veterans law. Thus, not only are veterans precluded from hiring attorneys to represent them before the VA, but they also experience more difficulty in obtaining qualified legal representation in cases that fall outside the VA than they would if a free market for legal services prevailed. VVA believes that the elimination of the fee restriction will benefit all veterans by fostering the growth of a private bar with the skills and experience to provide specialized legal assistance to veterans.

SUMMARY OF ARGUMENT

The procedural due process issue presented in this case differs from that of the typical due process challenge in that appellees do not seek the creation of new procedural rights. All that appellees seek in challenging the fee limitation is that the right to representation by counsel before the VA, which is already established by statute and recognized in the VA's regulations, be made meaningful by allowing veterans to hire counsel of their own choice. Fundamental fairness requires elimination of the fee limi-

tation because a veteran's interest in hiring counsel of his choice far outweighs the government's interest in retaining the fee limitation.

Although the VA adjudication process does not involve trial-type procedures, it is a highly complex legal process that determines matters of vital importance to veterans. The VA itself relies heavily on the skills of its lawyers, particularly at the BVA level, and VVA's experience in representing veterans before the VA confirms that numerous aspects of the VA adjudication process call for the exercise of lawyers' skills on behalf of veterans. Lawyers can play a critical role in advising veterans on such threshold strategic decisions as whether their claims should be brought before the VA in the first instance or whether resort to other fora is necessary to establish conditions of eligibility for VA benefits. Lawyers can assist veterans in marshalling and presenting the complex factual and medical evidence that must be established in order to obtain VA benefits. Trained legal analysis is frequently critical in mastering the substantive legal concepts that arise in the course of VA adjudication. Finally, lawyers are particularly well suited to brief the issues that are dispositive of veterans' claims and to represent veterans in hearings before the BVA.

In contrast to veterans' substantial interest in being free to hire counsel of their choice, the government's asserted interests in retaining the fee limitation are mere rationalizations that are unsupported by the record in this case. Moreover, the government's reliance on Congress' failure to abolish the fee limitation is irrelevant to the constitutional issue. Even if Congress had unqualifiedly endorsed the fee limitation, which is far from the case, it remains the responsibility of the courts, not Congress, to determine the constitutionality of the fee limitation statute.

In addition to violating veterans' due process rights, the fee limitation is manifestly at odds with the First

Amendment. Not only does it infringe upon the First Amendment rights of the organizational appellees, as the district court found, but it infringes upon the First Amendment rights of individual veterans in two ways. First, the fee limitation effectively prevents veterans from hiring lawyers to speak on their behalf before the VA and thereby directly restrains the speech that is uttered on a veteran's behalf. Second, by preventing veterans from hiring lawyers to represent them before the VA, the fee limitation inhibits veterans from consulting with lawyers on other legal matters related to their status as veterans, thereby foreclosing them from access to information necessary to conduct their legal affairs in a knowledgeable and responsible manner.

ARGUMENT

I. THE FEE LIMITATION DENIES VETERANS PROCEDURAL DUE PROCESS BY FORECLOSING ACCESS TO COUNSEL OF THEIR CHOICE IN VA CLAIMS PROCEEDINGS

The government's analysis of the due process issue in this case is inherently defective because the government approaches the issue as if appellees were seeking to create a wholly new procedural right—the right to be represented by counsel in claims proceedings before the VA. In fact, the very circumstance that distinguishes this case from most other due process actions is that appellees do not request the institution of new or incremental procedural protections at additional cost to the government. Appellees do not seek additional opportunities to be heard, *cf. Goldberg v. Kelly*, 397 U.S. 254 (1970); they do not seek to convert the VA claims adjudication process into trial-type proceedings, *cf. Mathews v. Eldridge*, 424 U.S. 319 (1976); nor do they seek to have counsel provided for them at the government's expense, *cf. Gideon v. Wainwright*, 372 U.S. 335 (1963). Indeed, appellees do not even seek the right to be represented by counsel before the VA. That right is already provided by statute:

> The Administrator may recognize any individual as an agent or attorney for the preparation, presentation, and prosecution of claims under laws administered by the Veterans' Administration.

38 U.S.C. § 3404(a) (1982). This right to representation by a lawyer is confirmed in regulations promulgated by the VA.[4]

All that appellees seek in this case is that the already established right to representation by an attorney before the VA be made meaningful by permitting veterans to hire counsel of their own choice. The existing scheme is constitutionally deficient because it confers the right to legal representation but, through the fee limitation, restricts the exercise of that right to veterans who are fortunate enough to obtain free legal services. Thus many veterans are unable to be represented by attorneys before the VA, even though they wish to be and are willing to pay for such representation.[5]

The recognition that this case involves only a request that veterans be given a meaningful opportunity to avail themselves of existing procedures—not a request that new or expanded procedures be provided—underscores the frailty of the government's arguments in support of the fee limitation. For example, the contention that the "informal and nonadversarial" nature of the VA claims system somehow insulates the fee limitation from due process challenge is at odds with the fact that Congress explicitly authorized the participation of attorneys in VA claims proceedings. Clearly the procedural protection that

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[4] *See* 38 C.F.R. § 3.103(d) (1984) ("[C]laimant is entitled to representation of his choice at every stage in the prosecution of a claim."); 38 C.F.R. § 19.150 (1984) (appellant before the BVA "will be accorded full right to representation in all stages of an appeal by a recognized organization, attorney or agent").

[5] The government does not dispute the district court's finding that "the $10.00 fee limitation essentially eliminates veterans' right to obtain private counsel of their own choosing to represent them in bringing service-connected death and disability claims before the VA." J.S. App. 22a.

appellees seek here—access to representation by counsel of their choice—cannot be antithetical to a VA adjudication process that by statute and regulation contemplates the participation of counsel.

In VVA's view, the determination of whether the VA claims process is "adversarial" or "nonadversarial" is not a necessary step in resolving the issue of the constitutionality of the fee limitation. From the perspective of the veteran who is determining how to pursue his claim for benefits before the VA, the issue is not how closely VA proceedings resemble trial-type proceedings; the issue is whether the veteran reasonably believes that, because his claim is sufficiently critical to his well being or difficult to prove or complex, it is in his best interest to be represented by a lawyer of his choice. VVA's own experience of the VA claims process has demonstrated that there are numerous aspects of that process that would justify a veterans' belief that he should retain a lawyer, whether or not the process is nonadversarial in nature. *See infra* Part I.A.

For similar reasons, VVA believes that the availability of free assistance before the VA by various service organizations does not compensate for the constitutional infirmity of the fee limitation. Congress did not establish service organization representation as the exclusive form of representation before the VA, and there is no other basis for inferring that the availability of free representation should preclude a veteran from retaining counsel of his choice. Moreover, in VVA's view, there is no basis for assuming, as the government and DAV seem to do, that the right to counsel could only be triggered by a determination that service organizations' representatives are inadequate. VVA believes that the availability of free service organization representation is beneficial to veterans as a class.[6] Assuming the general competence of

[6] VVA also wishes to make clear that its participation in this case on behalf of appellees is not intended to "raise an inference about the adequacy of DAV's" NSO representation system. *See* DAV Br. at 15.

service representatives, it is nevertheless the case that many veterans rationally prefer to retain the services of a lawyer. VVA itself has chosen to require legal training and lawyer supervision of all who appear before the BVA on its behalf because it believes that such training and supervision is advantageous to veterans. Similarly, many veterans might choose to retain counsel because they believe that this would best serve their individual interests. The fee limitation precludes them from making that choice.

Procedural due process is, as the government acknowledges, a guarantee of fundamental fairness. *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). The determination of what constitutes fundamental fairness will, of course, vary from case to case because "'[d]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Restaurant Workers Union Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). In this case, where Congress and the VA itself have expressly contemplated that veterans can be represented by lawyers in pursuing their claims before the VA, fundamental fairness requires that they be allowed to retain lawyers of their own choice, at no cost to the government. Veterans' private interests in being able to secure the assistance of counsel in pursuing claims before the VA far outweighs the government's asserted interests in retaining the fee limitation.

A. Veterans Have a Compelling Interest in Being Represented by Counsel of Their Choice in VA Claims Adjudication

Veterans and their dependents have an undisputed vital stake in recovering service-connected death and disability benefits from the VA. The district court found that

> [t]he veterans' interest in obtaining service-connected death and disability benefits is extremely high. Their need for such benefits is great and compensation through the VA claims procedure is the veterans'

> sole remedy against the government. They cannot sue for disabilities stemming from their military service under the Federal Tort Claims Act. *Feres v. United States*, 340 U.S. 135 (1950).

J.S. App. 20a. Moreover, since there is no judicial review of VA claims determinations, 38 U.S.C. § 211(a), the VA's resolution of any given claim is dispositive. If the veteran does not prevail before the VA, he will not obtain or keep the benefits administered by the agency that may be essential to his well being or very survival.[7]

The interest of veterans in retaining counsel to pursue VA benefits stems from the nature of the VA claims adjudication process itself. The district court analyzed that process in considerable detail and concluded that "[t]he undisputed factual evidence submitted by the plaintiffs in this case shows that both the procedures and the substance entailed in presenting SCDD claims to the VA are extremely complex." J.S. App. 30a. VVA's own experience in representing veterans before the VA emphatically con-

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[7] The government does not deny that veterans have a vital stake in the outcome of VA benefit claims proceedings. Similarly, the government indicates that it does not press the argument that applicants for VA service-connected death and disability benefits do not have a property interest that is protected by the Due Process Clause. Appellants' Br. at 46 n.49. The government suggests that the Court need not reach that issue in this case. *Id.*

If, however, the Court does reach the question, VVA strongly urges the Court to find that applicants for service-connected death and disability benefits *do* have a protected property interest in those benefits. Such benefits, like the welfare benefits in *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970), "are a matter of statutory entitlement for persons qualified to receive them." There is no principled distinction between the situation of the claimants in *Goldberg* who faced termination of their benefits because their qualifications for such benefits had been called into question and the situation of veterans who resort to the VA in order to establish their qualifications for benefits. In both cases, the right to benefits is established by statute and the administrative proceeding is the vehicle for determining whether the statutory criteria are satisfied. *See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

firms that the VA adjudicative process is every bit as complex as the district court found it to be. Moreover, VVA has found that many of the complexities presented by the VA adjudicative process are precisely the sort that call for the exercise of legal judgment and skills.

The government's suggestion that the nonadversarial nature of the VA adjudicative process renders lawyers unnecessary is myopic.[8] While the VA adjudicative process may be nonadversarial in contrast to trial-type proceedings, it is nevertheless in its very essence a legal process. And the VA itself assigns a fundamental and central role to attorneys in that process. The VA has hundreds of lawyers who are intimately involved in every aspect of veterans claims adjudication. At least one member of each of the three-person rating boards that decide claims at the regional office level is a legal specialist, usually an attorney.[9] Other attorneys are involved at the regional office level in reviewing disputed initial decisions and preparing statements of the case in those instances where veterans disagree with the action of the regional office.

The participation of VA attorneys is even more intensive at the appeals level. The BVA consists of 16 three-member panels; fifteen of those panels include two lawyers and the sixteenth is comprised entirely of lawyers.[10]

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[8] The government's erroneous view of the process may stem from its inexplicable refusal to consider the factual record that formed the basis for the district court's conclusions. *See* Appellants' Br. at 35 n.35.

[9] Popkin, *The Effect of Representation in Nonadversary Proceedings—A Study of Three Disability Programs*, 62 Cornell L. Rev. 989, 1004 (1977).

[10] *See* I Legal Services Corp., Special Legal Problems and Problems of Access to Legal Services of Veterans, Native Americans, A Report to Congress as Required by § 1007(h) of the Legal Services Corp. Act of 1974, as amended A-4 (1980) [hereinafter cited as Legal Services Corp. Report].

Moreover, as of 1983, the work of the BVA was supported by a staff of 117 attorney advisors.[11] Finally, the BVA is, by statute, bound by the precedent opinions of the VA's General Counsel. 38 U.S.C. § 4004(c) (1982).

The extent to which legal training and skills are essential to the daily operation of the VA claims process is evidenced by the VA's own dependence on attorneys and by the duties assigned those attorneys. The following excerpts from VA descriptions of the "principal duties and responsibilities" for the jobs of attorney advisor to the BVA, at the GS-11, GS-13 and GS-14 levels respectively, are illustrative: [12]

GS-11

A. Reviews and evaluates the evidence in claims folders and prepares tentative appellate decisions in written form for consideration of the Board Section. In connection therewith, applies the laws administered by the VA to the facts in the individual cases. Cases are assigned on a selective basis to progressively gain experience in the various kinds of appellate issues.

GS-13

A. Reviews and evaluates the evidence in claims folders. Applies the laws administered by the Veterans Administration to the facts in the individual case; then, prepares appellate decisions in written form for consideration of a Board Section. Very difficult cases, involving questions of law and fact, are selected for assignment to incumbent. Examples: Cases in which there are multiple questions at issue; new or novel questions for which there are no precedents; claims for entitlement to several benefits; claims for entitlement under a number of different provisions of law; cases involving highly conflicting evidentiary data which must be reconciled; contesting claims from several claim-

[11] 1983 VA Ann. Rep. 115.

[12] The descriptions are reprinted in full in the Appendix to this brief at 1a to 5a.

ants for the same benefit; and cases vigorously argued by representatives.

B. Conducts research on original and novel questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. Gives advisory opinions orally or in writing on very difficult, complex and controversial problems encountered in appellate review.

D. When so requested by the Chief Member, attends hearings on appeals conducted before the Board in particularly involved cases, for the purpose of assisting the Section members in examining witnesses so as to assure that all relevant evidence is elicited.

GS-14

D. Prepares decisions requiring a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems submitted to the Board for final resolution. Obtains and evaluates expert opinions from the Chief Medical Director and independent medical experts associated with leading medical schools.

VVA submits that a legal process which, *inter alia*, requires the VA's own lawyers to exercise "a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems" is precisely the sort of process in which at least some veterans might require legal representation, whether or not the process is nonadversarial in nature. The range of skills exercised by attorneys is by no means limited to those that are exercised in purely adversarial proceedings. As this Court recognized in *Goldberg v. Kelly*, 397 U.S. at 270, "[c]ounsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient." Only one of these skills, the conduct of cross-examination, is limited to the adversarial context. All of the other attributes of skilled

counsel recognized by the Court—and several not specifically enumerated—are called upon in the VA claims adjudication process.

1. *Lawyers Can Assist Veterans in Making Crucial Strategic Decisions*

Whether or not they are involved in adversarial proceedings, lawyers are regularly called upon to advise their clients in making strategic decisions that affect their clients' rights. In VVA's experience, there are many situations in which veterans pursuing claims before the VA could benefit substantially from receiving informed strategic advice of the type that lawyers have the training and experience to give.

This advice may encompass such fundamental questions as whether the starting point in obtaining VA benefits is to bring a claim before the VA itself, or whether preliminary steps should be taken before other fora prior to the initiation of a VA claim. The facts underlying the decision in *Yagjian v. Marsh*, 571 F. Supp. 698 (D.N.H. 1983) are illustrative. There, plaintiff, a World War II veteran with a rare form of cancer, sought service-connected disability benefits from the VA. His claim was denied by the VA regional office and the BVA on the grounds that his disease was not service connected. Specifically, the BVA found that there was no indication of the disease in plaintiff's military records, although it acknowledged that the records were incomplete and could not adequately be reconstructed. Plaintiff then filed an application for correction of his military records with the Army Board for Correction of Military Records, an agency wholly unrelated to the VA, created by Congress pursuant to 10 U.S.C. § 1552 (1982).[13] Although his application was initially rejected by that agency, the

[13] Because the $10 fee limitation applies only to VA proceedings, Correction Board applicants are free to hire counsel of their choice. Moreover, Correction Board decisions are subject to judicial review. *Chappell v. Wallace*, 103 S. Ct. 2362, 2367 (1983).

district court on review reversed and ordered correction. Plaintiff was then in possession of sufficient evidence to establish service connection and could proceed to recover benefits from the VA. Clearly, the plaintiff in *Yagjian*, and the VA itself for that matter, would have been better served if he had been counseled by a lawyer with an overview of veterans law who could have advised him that his application to the VA would likely be futile unless he succeeded in correcting his military records.

Similar kinds of threshold strategic decisions can arise in the case of veterans who have been discharged from military service under other than honorable conditions. To become eligible for VA disability compensation, such veterans must either resort to fora outside the VA to upgrade the character of their discharge, or persuade the VA that the discharge should be deemed to have been granted under conditions other than dishonorable for the purpose of determining eligibility for VA benefits.[14] The non-VA fora with authority to issue a discharge upgrading determination binding on the VA include both military agencies created by Congress and the federal courts.[15] Veterans are permitted to hire lawyers to pursue their discharge upgrade claims before all these non-

[14] 38 C.F.R. § 3.12 (1984) defines the relationship between the character of discharge certificate issued by a military department and eligibility for VA benefits. Subject to certain narrowly defined exceptions, upgrades to an Honorable or General Discharge legally bind the VA to determine that the veteran is eligible for benefits.

[15] Discharge upgrading determinations can be issued by a Board for Correction of Military Records established pursuant to 10 U.S.C. § 1552 and Discharge Review Boards established pursuant to 10 U.S.C. § 1553. *See* 38 C.F.R. § 3.12 (1984). Decisions by these agencies denying applications to upgrade discharges are subject to judicial review. *See Harmon v. Brucker*, 355 U.S. 579 (1958). Veterans have also resorted directly to federal court in an effort to obtain upgrading of military discharge. *See Walters v. Secretary of Defense*, 725 F.2d 107 (D.C. Cir. 1983).

VA fora. The role of counsel in determining which fora to resort to and in what sequence can be critical:

> The complex interrelationship between the Discharge Review Boards, the Boards for Correction of Military Records and the VA serves to demonstrate the need for trained legal advocates. Depending upon the conduct involved, individual cases may start in any of the agencies and go to two or all for ultimate resolution. The choice of the proper forum is critical to maximizing [the] chance of success.[16]

2. *Lawyers Can Assure that Information Is Developed in a Manner that Will Maximize the Veteran's Chance of Prevailing on His Claim*

The ability to develop and organize complex factual information is a skill that is required of and acquired by virtually every competent lawyer, regardless of the nature of his practice. VVA has found that information development is of critical importance in pursuing claims before the VA.

The most fundamental form of information development required in VA adjudications is marshalling the factual and medical evidence that will establish a service-connected death or disability. Generally, essential portions of this evidence are contained in the veteran's military service records, which the VA routinely obtains in processing a benefits claim, but often the service records themselves are incomplete, or the medical information contained in them is insufficient to establish the claim. *See Yagjian v. Marsh*, 571 F. Supp. at 700 (some of veteran's service records apparently destroyed by fire at official records repository; extant records did not document his disease). In such cases, the veteran must develop the evidence from other sources such as affidavits of personnel who treated or knew of his medical condi-

[16] Legal Services Corp. Report, *supra* note 10, at 69 n.34.

tion while he was in the service, as well as the testimony of physicians who are currently treating him for his disability. In other cases, it may be necessary for a veteran to obtain military records other than his own service records in order to establish his claim. For example, in Post Traumatic Stress Disorder cases, where it is necessary to establish the traumatic service-related event that precipitated the veteran's psychological disability, VVA has found it advantageous to resort to the Freedom of Information Act to obtain military operational reports, casualty reports, letters to next of kin and the like in order to document the traumatic occurrence.

The development and presentation of medical evidence in VA claims frequently requires the use of medical experts. As the VA's own requirements for lawyer involvement demonstrate, lawyers have the training and experience required to develop a record based on expert testimony. A veteran's attorney could both help the veteran locate the medical experts who can be of greatest assistance in supporting his case and help draft the written testimony or present the oral testimony of the expert medical witness in the most cogent and persuasive manner.

3. *Veterans Need the Assistance of Lawyers in Resolving the Substantive Legal Issues that Frequently Arise in VA Proceedings*

A veteran's right to recover service-connected death and disability benefits from the VA is governed by a complex set of substantive statutory provisions and regulations that are the subject of ongoing interpretation in both informal and binding opinions by the VA's General Counsel. Legal analysis is frequently required to determine how a particular substantive legal standard applies to the facts of an individual veteran's case. For example, a veteran is precluded from recovering benefits if his service-connected disability arose as a result of his own willful misconduct. 38 U.S.C. § 331 (1982). The definition

of "willful misconduct" set forth in the VA's regulations and the operation of the concept is legalistic and complex:

> "Willful misconduct" means an act involving conscious wrongdoing or known prohibited action (malum in se or malum prohibitum). A service department finding that injury, disease or death was not due to misconduct will be binding on the Veterans Administration unless it is patently inconsistent with the facts and the requirements of laws administered by the Veterans Administration.
>
> (1) It involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences.
>
> (2) Mere technical violation of police regulations or ordinances will not per se constitute willful misconduct.
>
> (3) Willful misconduct will not be determinative unless it is the proximate cause of injury, disease or death.

38 C.F.R. § 3.1(n) (1984). The concept thus incorporates elements of intent analogous to the intent component needed to establish guilt under our system of criminal law and also incorporates such other inherently legal notions as "proximate causation." The need for trained legal assistance to rebut a suggestion of willful misconduct is manifest.

A similarly complex substantive legal issue arises from the VA regulations governing character of discharge from military service. Generally, a veteran's discharge must be under conditions "other than dishonorable" in order for him to be entitled to benefits. *See* 38 U.S.C. § 101(2) (1982). A veteran separated from the service under other than honorable conditions issued as a result of an absence without leave ("AWOL") for a continuous period of at least 180 days is disqualified from entitlement for benefits unless the VA determines that there are compelling circumstances to warrant the AWOL. *See* 38

C.F.R. § 3.12(c)(6) (1984). One of the factors that VA regulations require to be considered in determining whether there are such compelling circumstances is if "[a] valid legal defense exists for the absence which would have precluded a conviction for AWOL." 38 C.F.R. § 3.12(c)(6)(iii) (1984). A veteran would be extremely hard pressed to make this showing of compelling circumstances without mastering principles of substantive military law.

Other instances of the legal concepts that permeate VA regulations and its adjudication process are too numerous to set forth in detail. The regulations establish a complex burden of proof standard which requires the claimant "to submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded." 38 C.F.R. § 3.102 (1984). The regulations also contain provisions governing the introduction and operation of "new and material evidence." 38 C.F.R. § 3.156 (1984). In addition to the statutes and rules, the VA General Counsel issues a steady stream of opinions, both informal and binding, that shape the contours of substantive VA law. These decisions regularly address such complex legal issues as the retroactive determination of effective dates for establishing eligibility for VA benefits, the effect of decisions of the military service Discharge Review Boards and Boards for Correction of Military Records upon substantive VA benefit standards, the interrelationship between the different—and sometimes conflicting—statutory provisions governing eligibility for VA benefits, and the effect of state law provisions in determining eligibility for certain VA benefits. To comprehend fully the vast majority of these General Counsel opinions and to apply the rules of law they establish to the facts of an individual veteran's claim is a lawyer's task.[17]

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[17] The assistance of lawyers is required not only to master the complex legal standards involved in VA claims proceedings; it is also critical in mounting challenges to the legality of certain of those standards. Veterans who have been able to obtain free legal

4. *The Assistance of Lawyers Is Often Required in Order to Produce Effective Briefs and in Order to Guarantee Effective Oral Advocacy*

Whether or not the VA adjudication process is non-adversarial, VVA has found that the skills of legal advocacy are often critical in resolving a claim in the veteran's favor. These skills are particularly essential at the BVA level where veterans' claims are heard *de novo* and where two of three members of the typical BVA panel are lawyers. In VVA's experience, effective advocacy before the BVA entails the careful preparation of briefs setting forth the facts of the veteran's case and discussing the applicability of the substantive law, including any relevant VA General Counsel opinions, to those facts.[18] The preparation of such briefs is, of course, a task for which lawyers are particularly trained.[19]

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representation have succeeded in persuading federal courts that various of the standards applied by the VA as a bar to the recovery of benefits are unlawful. *See, e.g., McKelvey v. Walters*, 596 F. Supp. 1317 (D.D.C. 1984) (holding that 38 C.F.R. § 3.301(c)(2), which requires denial of benefits in all cases involving primary alcoholism, violates § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794); *Tinch v. Walters*, 573 F. Supp. 346 (E.D. Tenn. 1983) (same), *appeals docketed*, Nos. 83-5926 & 83-5955 (6th Cir., filed Dec. 12, 1983); *Peed v. Cleland*, 516 F. Supp. 469 (D. Md. 1981) (holding that VA regulations requiring that military retirement benefits be considered as income in computing eligibility for VA pension violates congressional intent).

[18] The Veterans Administration has also recognized that "attorneys because of their analytical skills and abilities to argue persuasively from a carefully prepared evidentiary record are peculiarly able to represent a claimant in a forceful, professional and effective manner especially at the BVA and court levels." S. Rep. No. 178, 96th Cong., 1st Sess. 103 (1979).

[19] The District Court found that "it is standard practice for service organization representatives to submit merely a one to two page handwritten brief. This brief rarely cites to authority, and in fact is frequently written by the claimant himself rather than by the representative." J.S. App. at 36a-37a (citations omitted).

In addition to providing effective written support for a veteran's claim at the BVA level, VVA has found that lawyers are particularly likely to request an oral hearing before the BVA. As the district court noted, the VA's own statistics show that where a personal hearing was held before the BVA, the claimant was twice as likely to succeed. J.S. App. at 35a.[20] Such oral hearings are normally sought in cases handled by VVA lawyers and provide a critical opportunity to bring into focus the factual and legal contentions that warrant a grant of the veteran's claim.[21] An attorney can guarantee that these opportunities to be heard are, in fact, meaningful ones. *See Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Goldberg v. Kelly*, 397 U.S. at 270.

B. The Government's Claimed Interest in Retaining the Fee Limitation Is Insubstantial

The government contends that the fee limitation withstands constitutional challenge because Congress has considered abolishing the fee limitation but has not done so. *See* Appellants' Br. at 33-43. The government also suggests that there are several "legitimate purposes" of the fee limitation that justify its retention. *See id.* at 30-32. In VVA's view, neither of these arguments has any merit.

The failure of Congress to amend the fee limitation statute does not dispose of the question of whether this

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[20] The Senate Committee on Veterans' Affairs also noted that the VA's statistics "are very suggestive that a personal appearance before the Board makes a significant difference in achieving favorable resolution of a claim." S. Rep. No. 178, 96th Cong., 1st Sess. 33 (1979).

[21] Contrary to the government's assertion that "questions of credibility and demeanor do not play a significant role" in service-connected disability claims, VVA has found that the BVA attaches considerable weight to a veteran's credibility and demeanor. *See* 38 C.F.R. § 19.165 (1984) (requiring swearing of witnesses). Moreover, trained counsel can advise the veteran so as to assure the effective presentation of his testimony.

statute as enacted and as applied is constitutional, nor is this failure a reliable indicator that Congress found the existing system to be fair and constitutional. *See Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 382 n.11 (1969); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 265 (1945). On the contrary, the fact that the Senate, in each of the last three sessions, passed legislation to permit hired attorneys before the VA in some circumstances indicates substantial congressional dissatisfaction with the fee limitation.[22]

Even if Congress had expressed its belief in the constitutionality of the fee limitation, "it is the responsibility of this Court to act as the ultimate interpreter of the Constitution." *Powell v. McCormack*, 395 U.S. 486, 549 (1969). That Congress may have a different view regarding the constitutionality of a given statute "cannot justify the courts' avoiding their constitutional responsibility." *Id.* (footnote and citations omitted). Thus, the Court must examine the reasons advanced by appellants in support of the fee limitation statute.

The government's asserted reasons for retaining the fee limitation are mere rationalizations that are far outweighed by veterans' interest in hiring counsel of their choice. For example, the government suggests that the fee limitation should be retained because it assures that benefits recovered from the VA will be available solely

[22] The Senate Report principally relied on by the government did not endorse the complete exclusion of hired attorneys from the VA process. It found that the existing statutory limitation "is an undue hindrance on the rights of veterans . . . to select representatives of their own choosing" and reported out a bill allowing a veteran to choose to hire an attorney after the BVA initially denies a claim for benefits. S. Rep. No. 466, 97th Cong., 2d Sess. 50 (1982). The availability of an attorney at this juncture is significant; as the government observes, "[a]lthough the decision of the BVA is final, liberal provisions exist for reconsidering a BVA decision and for reopening a denied claim on the basis of new evidence." Appellants' Br. at 8 n.8.

for veterans' use and not diminished by lawyers' fees. Appellants' Br. at 31. The fallacy of this justification is that it assumes the recovery of benefits by the veteran. But it is the very difficulty of recovering benefits that warrants the decision by a veteran that his interests would be best served by retaining a lawyer. The veteran who pays his lawyer a portion of any recovered benefits is manifestly better off than the veteran who does not recover benefits at all. Veterans, like other purchasers of legal services, should be left free to make decisions concerning their own economic self-interest.

The government further claims that the fee limitation protects veterans from unscrupulous attorneys. *Id.* at 32. That rationale is outmoded and, VVA believes, an affront to the intelligence and judgment of veterans. Existing disciplinary rules and state laws are clearly adequate to protect veterans from unethical or unlawful conduct on the part of attorneys.[23] More fundamentally, there is no rational basis for singling out veterans as the sole class of recipients of federal benefits who are presumed to be incapable of recognizing their own interests and who require special protection from lawyers.

Finally, the government argues that the retention of the fee limitation is necessary in order to preserve the nonadversarial nature of the VA adjudication system. *Id.* at 30. The notion that abolition of the fee limitation would alter the nature of the VA system is mere uninformed speculation. In fact, lawyers already represent veterans before the VA and there is no evidence in the

[23] The Senate Report relied upon by the government also rejects the claim that the fee limitation is necessary to protect veterans from unscrupulous lawyers. "Whatever the merits of such a view at the time that the limitation was imposed, . . . it is the Committee's position that such a view of today's organized bar, particularly in light of the widespread network of local bar associations that now generally police attorney behavior, is no longer tenable." S. Rep. No. 466, 97th Cong., 2d Sess. 50 (1982) (citations omitted).

record to indicate that their presence has impeded the system from working in a nonadversarial manner. Other benefit programs, notably the social security system, are nonadversarial in many of the same ways as the VA system; yet the social security system has accommodated the presence of paid attorneys for years.[24]

The Disabled American Veterans have also asserted an interest in retaining the fee limitation. DAV suggests that some veterans perceive a special "psychological value" in being represented before the VA by DAV service representatives who share similar "personal conditions" as the claimants. DAV Br. at 13-14. DAV further suggests that the invalidation of the fee limitation would imperil this psychological value and undermine DAV's representation program. *Id.* at 26-27. DAV's concern is misplaced. Striking down the fee limitation will in no way deter veterans who perceive a psychological value in being represented by DAV's personnel from

[24] The cases relied upon by the government for the proposition that the presence of counsel will transform the nature of the proceeding are wholly inapposite to the VA adjudicatory process. *See* Appellants' Br. at 30. *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Baxter v. Palmigiano*, 425 U.S. 308 (1976), involved the question of whether a due process right to counsel exists in prison disciplinary proceedings. The Court's determination that granting access to counsel in this context could severely disrupt correctional goals, 418 U.S. at 570, has no relevance to proceedings before the VA. The summary court-martial proceedings at issue in *Middendorf v. Henry*, 425 U.S. 25 (1976), are similarly inapplicable to the VA context. There Congress provided alternative procedures that an accused service member could invoke in defending against criminal charges. The Court's decision to preserve the summary character of one set of procedures by denying the right to appointed counsel at the government's expense when this right could be invoked in full-scale court-martial proceedings has no bearing on the VA adjudication process, which is neither a summary sort of proceeding nor an alternative to a more elaborate proceeding where the right to counsel is guaranteed. Finally, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court merely denied an automatic right to state-appointed counsel in revocation of probation cases.

continuing to use such representation.[25] What invalidation of the fee limitation will do is give other veterans an opportunity to pursue their own perceived psychological values by being represented by counsel of their choice.[26]

II. THE FEE LIMITATION INFRINGES ON VETERANS' FIRST AMENDMENT RIGHTS OF SPEECH AND ASSOCIATION AND THE RIGHT TO PETITION FOR REDRESS OF GRIEVANCES

A. The Fee Limitation Violates the First Amendment by Denying Veterans the Advocates of Their Choice

The right of a veteran to recover service-connected death and disability benefits from the VA is contingent upon his ability or that of his representative to establish his claim before the agency. A veteran must "submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded." 38 C.F.R. § 3.102 (1984). The process as a whole involves an effort on the veteran's behalf to petition the government for redress of his grievances and its principal components are various forms of written and oral speech.

The fee limitation inhibits the veteran's efforts to petition the VA and restrains the speech uttered on his behalf because it effectively precludes the veteran who wishes to hire a lawyer from communicating with the VA through the advocate of his choice. While the veteran

[25] As to the allegation of harm to the service organizations as a result of elimination of the fee limitation, DAV is unable to posit any manifestations of harm other than to suggest that enterprising lawyers might hire some of DAV's service representatives as paralegals. *Id.* at 26. Even if this unfounded speculation proved accurate, VVA is unable to understand why DAV should be protected from such changes in personnel which are commonplace in our nation's economy.

[26] It is certainly reasonable to believe that just as some veterans perceive a psychological value in being represented by disabled veterans, others perceive a distinct benefit in being represented by counsel whom they have personally selected. *See* Carrington, *The Right to Zealous Counsel*, 1979 Duke L.J. 1291 (1979).

is not prevented from petitioning or speaking altogether, he is prevented from engaging in the particular mode of petitioning and speaking that will most effectively present his case. By prohibiting paid legal advocacy, the fee limitation amounts to censorship of a powerful and effective mode of speech.

This Court has recognized that the effectiveness of certain kinds of speech is a function of the resources that can be devoted to that speech. For example, arbitrary restrictions on the amount of money that a person can spend on political speech

> represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech. The $1,000 ceiling on spending "relative to a clearly identified candidate," . . . would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication.

Buckley v. Valeo, 424 U.S. 1, 19-20 (1976) (footnotes and citation omitted). Similarly, in this case, the fee limitation constitutes a substantial restraint on the kind of advocacy in which the veteran can engage, thereby undermining the effectiveness of the veteran's efforts to obtain VA benefits. Allowing veterans to hire lawyers subject to the $10 fee limitation "is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Id.* at 18 n.19.

This Court's decision in *Buckley v. Valeo* is particularly apposite because the positions that hired lawyers would advocate on a veteran's behalf before the VA have overtones of political speech. VVA's experience indicates that the situations in which lawyer representation before the VA is especially critical include claims for disabilities arising from exposure to toxic chemicals and atomic radiation and Post Traumatic Stress Disorder claims. Although the veterans bringing these claims are seeking benefits in order to improve their own economic and so-

cial condition, such claims that arise out of controversial military activities are inevitably tinged with political speech. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (soliciting for financial support "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues"). Veterans who, with the assistance of counsel, forcefully present such controversial claims compel the government to address the broader social implications of its military policies and also provide a point of focus for political debate over such policies. Legal advocacy that fosters broader social and political goals is a form of political expression that is protected by the First Amendment. *NAACP v. Button*, 371 U.S. 415, 428-29 (1963). The fee limitation impermissibly restricts this form of expression.

B. The Fee Limitation Restricts Veterans' Access to Information that Is Vital to Their Interests

One of the most important forms of information disseminated in our society is information concerning an individual's legal rights. The principal source of such information is the lawyer who is trained in the particular field of law that affects the individual's interests. This Court has recognized the critical need for access to legal information and has expressed its "concern that the aggrieved receive information regarding their legal rights and the means of effectuating them." *Bates v. State Bar*, 433 U.S. 350, 376 n.32 (1977). And the District of Columbia Circuit has recently held that "while private parties must ordinarily pay their own legal fees, they have an undeniable right to retain counsel to ascertain their legal rights." *Martin v. Lauer*, 686 F.2d 24, 32 (D.C. Cir. 1982) (citations omitted).

The fee limitation directly infringes upon a veteran's First Amendment right to obtain information from a lawyer regarding his rights before the VA because it pre-

cludes the veteran from hiring a lawyer to represent him before the agency. While this infringement is sufficiently serious in itself to warrant the invalidation of the fee limitation, VVA believes that it is critical to recognize that the fee limitation also inhibits a veteran's ability to obtain information about other facets of veterans law that may directly affect his legal rights.

The benefit programs administered by the VA under Title 38 of the United States Code represent only one facet of substantive federal law that governs the rights of veterans. Veterans' rights are also affected by provisions of federal law governing their ability to upgrade the character of their discharge from military service, *see* 10 U.S.C. §§ 1552-1553 (1982), and by statutes governing veterans' ability to obtain physical disability retirement compensation directly from the various military service departments. *See* 10 U.S.C. §§ 1201-1221 (1982). Other legal rights may accrue to veterans in particular circumstances. For example, a veteran who is injured as a result of the medical malpractice of the VA while being treated as a veteran may have a claim for disability benefits from the VA, but also can, in the alternative, bring suit against the VA under the Federal Tort Claims Act. 38 U.S.C. § 351 (1982).

Given the range of legal actions and remedies potentially available to veterans, one of the most critical questions a veteran will ever have to decide is which action or combination of actions should be pursued in order to best serve his interests in any given case. For example, the veteran may be in a position to choose between pursuing service-connected disability benefits from the VA or physical disability retirement compensation from his particular military service department,[27] but he cannot obtain benefits under both programs. 38 U.S.C. §§ 3104-3106. In order to make this decision, the veteran would have to consider a variety of factors including the extent of his disability, the permanency of his disability, his military pay level, the chances of prevailing and the availability of judicial review.[28]

[27] To obtain military department disability compensation after discharge, a veteran must apply to a Board for Correction of Military Records. *See, e.g., Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962), *cert. denied*, 373 U.S. 932 (1963).

Given its complexity, the decision of how to proceed is clearly one that very few veterans would be wise to undertake without the advice of a lawyer. But the fee limitation substantially reduces the likelihood that most veterans would even consult a lawyer before making this and similar decisions involving overlapping areas of veterans law, because they would know that the lawyer could not represent them before the VA. If a lawyer were hired and advised the veteran to pursue the option of seeking benefits from the VA, the veteran would have to dispense with the services of his lawyer at the point that the VA claim was filed. The veteran would be deprived of the value of an ongoing attorney-client relationship and of the opportunity to follow up on his claim in the manner contemplated by his counsel.

The disincentives for open communication and exchange of information between veterans and lawyers in the area of veterans law have resulted in a pronounced shortfall in the number of members of the private bar with substantial expertise in veterans law.[29] In VVA's experience, members of the private bar have been inhibited from becoming specialists in veterans law because their contacts with veterans have been restricted by the fee limitation

[28] *See generally* Wellen, *Armed Forces Disability Benefits—A Lawyer's View*, 27 JAG J. 485 (1974).

[29] In *United States v. Brandon*, 584 F. Supp. 803, 807 (W.D.N.C. 1984), an action to collect overpayment of VA benefits from a veteran, the court stated that it was "not aware of any [overpayment] case in which the veteran has been represented by a lawyer," although the $10 fee limitation does not prohibit hiring counsel in such cases.

and because they realize that the fee limitation severely restricts the possibility of developing an economically viable practice. While lawyers are undoubtedly prejudiced by this situation, it is veterans themselves who are the ultimate losers. They are deprived of a marketplace for information and legal services that is available to virtually every other American who is able to retain counsel of his choice.

VVA believes that elimination of the fee restriction will facilitate communication between veterans and members of the private bar, thereby helping to ensure that veterans are adequately informed of their legal rights. As this Court has recognized, "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication rather than to close them." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976).

CONCLUSION

For the foregoing reasons, VVA urges the Court to affirm the decision below.[30]

Respectfully submitted

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March 8, 1985

[30] This brief was prepared with the assistance of Michael P. Ettlinger of VVA Legal Services.

APPENDIX

APPENDIX

POSITION DESCRIPTION FOR ATTORNEY-ADVISER (GS-11) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 2, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders and prepares tentative appellate decisions in written form for consideration of the Board Section. In connection therewith, applies the laws administered by the VA to the facts in the individual cases. Cases are assigned on a selective basis to progressively gain experience in the various kinds of appellate issues.

B. Conducts research on occasion on questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the close supervision of the Chief Member, who is responsible for training and control of quality of tentative decisions. The incumbent may obtain the advice of Medical Advisers on medical problems and Senior Attorneys, where indicated, on legal problems arising in the preparation of tentative decisions. In general, however, he/she is expected to utilize initiative and judgment in evaluating the evidence and making findings of fact and conclusions of law in tentative decisions.

III. OTHER SIGNIFICANT FACTS

Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR ATTORNEY-ADVISER (GS-13) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, MARCH 11, 1982

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Reviews and evaluates the evidence in claims folders. Applies the laws administered by the Veterans Administration to the facts in the individual case; then, prepares appellate decisions in written form for consideration of a Board Section. Very difficult cases, involving questions of law and mixed questions of law and fact, are selected for assignment to incumbent. Examples: Cases in which there are multiple questions at issue; new or novel questions for which there are no precedents; claims for entitlement to several benefits; claims for entitlement under a number of different provisions of law; cases involving highly conflicting evidentiary data which must be reconciled; contesting claims from several claimants for the same benefit; and cases vigorously argued by representatives.

B. Conducts research on original and novel questions encountered in case review or as requested by the Section. Drafts briefs outlining findings and recommendations as to appropriate action.

C. Gives advisory opinions orally or in writing on very difficult, complex and controversial problems encountered in appellate review.

D. When so requested by the Chief Member, attends hearings on appeals conducted before the Board in particularly involved cases, for the purpose of assisting the Section members in examining witnesses so as to assure that all relevant evidence is elicited.

E. As assigned, prepares correspondence on the more controversial appellate decisions and problems

for the Administrator's and the Chairman's signatures.

F. As assigned, classifies appellate decisions for inclusion in BVA Index I-01-1 and prepares summaries of decisions designated as "select."

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the general direction of the Chief Member. In general, is responsible for and is relied upon to prepare decisions in final form for the Board Section's review and consideration, and receives no technical supervision. Utilizes own initiative and judgment in evaluating the evidence, making findings of fact and conclusions of law. May confer with and seek advice on complicated medical or legal problems from medical advisers or Senior Attorneys.

III. OTHER SIGNIFICANT FACTS

Must be a member of the bar, in good standing.

POSITION DESCRIPTION FOR SENIOR ATTORNEY-ADVISER (GS-14) FOR THE VETERANS ADMINISTRATION, BOARD OF VETERANS APPEALS, BOARD SECTION, JUNE 10, 1983

I. PRINCIPAL DUTIES AND RESPONSIBILITIES

A. Prepares decisions on extremely complex and controversial appeals involving formal personal hearings held before members of the Board in Central Office and before Travel Sections of the Board in the field.

B. Attends formal personal hearings with the members.

C. Conducts pre-hearing meetings and discussions with Members of Congress, attorneys, appellants and service organization representatives to assure due process of law and to expedite the hearing process.

D. Prepares decisions requiring a high order of original and creative endeavor based on extensive research of the most complex legal and medical problems submitted to the Board for final resolution. Obtains and evaluates expert opinions from the Chief Medical Director and independent medical experts associated with leading medical schools.

E. By direction of the Deputy Vice Chairman, formulates legal guidelines for use by other attorney-advisers to achieve uniformity throughout all Sections of the Appellate Group in the disposition of issues on appeal. Participates with medical advisers in the development of medico-legal guidelines.

F. Prepares decisions on cases before the Board through petition for reconsideration, where briefs or hearings to show error in a prior appellate decision have been presented and where the participating Board membership has been increased to six or more

in lieu of the usual three signatories for a de novo appellate decision.

G. Serves as Acting Board Member in the event of vacancy or in the absence of regular members, as designated by the Chairman or Vice Chairman of the Board.

H. Performs special professional assignments from the Chairman, Vice Chairman, Deputy Vice Chairman or Chief Member, to assist in the continued improvement of appellate services.

II. SUPERVISORY CONTROLS OVER THE POSITION

Serves under the direction of the Chief Member of the Board Section, who assigns the duties enumerated above and exercises general administrative supervision.

III. OTHER SIGNIFICANT FACTS

A. Must have broad legal experience in the field of veterans' benefits, preferably with at least 2 years as an attorney-adviser for the appellate agency in the GS-13 level. Must have demonstrated exceptional ability to: timely prepare high quality decisions on extremely complex and controversial appeals involving unusual issues; authoritatively discuss legal and medical principles and evidentiary requirements with outside attorneys, physicians and appellants.

B. Must be a member of the bar, in good standing.

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No. 84-571

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY N. WALTERS, ADMINISTRATOR OF VETERANS' AFFAIRS, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF RADIATION SURVIVORS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR THE APPELLANTS

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24 pp

TABLE OF AUTHORITIES

Cases: Page

"Agent Orange" Product Liability Litigation, In re, MDL No. 381 E.D.N.Y. Feb. 8, 1985) 11
Boddie v. *Connecticut*, 401 U.S. 371 5
Califano v. *Yamasaki*, 442 U.S. 682 3
Gault, In re, 387 U.S. 1 3
Goldberg v. *Kelly*, 397 U.S. 254 ..... 4, 5
Landmark Communications, Inc. v. *Virginia*, 435 U.S. 829 8
Landon v. *Plasencia*, 459 U.S. 21 6
Leary v. *United States*, 395 U.S. 6 7
Mathews v. *Eldridge*, 424 U.S. 319 ..... 3, 5, 7, 13
Ortwein v. *Schwab*, 410 U.S. 656 ..... 5, 10
Richardson v. *Perales*, 402 U.S. 389 13
Schweiker v. *McClure*, 456 U.S. 188 3
United States v. *Boyle*, No. 83-1266 (Jan. 9, 1985) .. 14
United States v. *Kras*, 409 U.S. 434 5
United States v. *New Mexico*, 455 U.S. 720 9

Constitution, statute and regulations:

U.S. Const.:
Amend. I 10
Amend. V (Due Process Clause) 5
38 U.S.C. 3404 2
38 U.S.C. 3404(c) 1, 5, 6, 8, 9, 10
38 C.F.R.:
Section 3.102 14
Section 19.121(b)(2) 15
Section 19.121(b)(3) 15
Section 19.123(a) 15
Section 19.180(a) 15

Miscellaneous:

131 Cong. Rec.:
p. H294 (daily ed. Feb. 4, 1985) 9
pp. S930-S937 (daily ed. Jan. 31, 1985) 9
H.R. 924, 99th Cong., 1st Sess. (1985) 9
H.R. Rep. 1454, 87th Cong., 2d Sess. (1962) 16

Miscellaneous—Continued: Page

H.R. Rep. 98-592, 98th Cong., 2d Sess. (1984) 11, 14
S. 367, 99th Cong., 1st Sess. (1985) 9
S. Rep. 1843, 87th Cong., 2d Sess. (1962) 16
S. Rep. 97-466, 97th Cong., 2d Sess. (1982) 9
Washington Post, Feb. 12, 1985 11

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Appellees and their amici fundamentally misconceive the nature of the legal issue in this case. In addition, although in our view it is not material to decision of the constitutional question presented, they significantly misconstrue the record developed during discovery. We shall first address the legal analysis that governs this case and then respond to appellees' characterization of the record.

I

1. Appellees contend that the only question before this Court is whether the district court abused its discretion in entering the preliminary injunction against enforcement of the fee limitation in 38 U.S.C. 3404(c). However, for the reasons stated in our opening brief (VA Br. 20-23), an appellate court has plenary authority to review and set aside a preliminary injunction that, as in this case, is premised on a fundamental and decisive error of law. Indeed, meaningful appellate review is especially appropriate and necessary here, since the court below enjoined a federal statute that Congress has adhered to for more than a century. A district court simply has no dis-

cretion to commit legal error and declare unconstitutional a valid Act of Congress.

2. In addition, appellees have all but ignored (see NARS Br. 26 n.16) one of our central contentions: even accepting arguendo appellees' assertion of numerous defects in the operation of the VA claims system, that would provide no basis to invalidate the fee limitation in Section 3404. See VA Br. 19-20. Appellees have not disputed that Congress intended the claims system to be an informal and nonadversarial process in which VA personnel and service organizations afford effective assistance to veterans without charge. Insofar as the system deviates from this design in practice, the appropriate remedy would be to correct those deficiencies by requiring compliance with the congressional scheme, not to strike down the fee limit and thus work a further departure from Congress's plan by making the system more formal and adversarial. Appellees have nowhere come to grips with this inherent conceptual flaw in their case.

3. Appellees purport to challenge the fee limitation provision "as applied" in so-called "complex" cases. See NARS Br. i, 2, 3, 21, 31-32 & n.21. This characterization is highly misleading. By its terms, appellees' argument focuses not on discrete and particular cases, which is the customary meaning of an "as applied" attack, but on broad categories of cases. Their approach entirely disregards the myriad differences that exist among these cases in terms of the circumstances of the claimants and their claims.

Moreover, the substance of appellees' position is not restricted to the asserted class of "complex" cases. Many of their objections to the VA's operation of the claims system, for example, are equally relevant system-wide. Indeed, appellees themselves recognize this fact (see NARS Br. 18). And, in an attempt to defend the overbroad relief entered by the district court (see VA Br. 14, 22), appellees expressly submit that "the fee limitation is unconstitutional in all of its applications" (NARS Br. 45 n.35).

4. Beyond this, appellees have failed to acknowledge several of the most important considerations that bear on the validity of the fee limitation. For example, they do not take account of the fact that they are challenging a federal statute that reflects Congress's consistent policy in this area since the time of the Civil War. As this Court has recognized, however, even in a due process case there is a "strong presumption in favor of the validity of congressional action" (*Schweiker* v. *McClure*, 456 U.S. 188, 200 (1982)) and a "willing[ness] to assume a congressional solicitude for fair procedure" (*Califano* v. *Yamasaki*, 442 U.S. 682, 693 (1979)).

Appellees also attempt to divorce the fee limitation from the overall context of veterans' programs. As discussed in our opening brief (at 27 n.24, 31 n.30), Congress has established a wide range of VA benefits and services that demonstrate a special concern for veterans; the nonadversarial claims system is reflective of the broader nonadversarial relationship between the government and veterans. Even within the service-connected claims system itself, Congress has provided special advantages and protections for veterans, including the affirmative obligation of the VA to assist them in making successful claims, the availability of free representation by accredited service organizations, and the liberal procedural and substantive standards applicable to such claims (see VA Br. 3-10, 27-28). Because " 'due process is flexible and calls for such procedural protections as the particular situation demands' " (*Mathews* v. *Eldridge*, 424 U.S. 319, 334 (1976) (citation omitted)), appellees err in treating the fee limit as though it were part of a conventional adversarial process. Compare, *e.g.*, *In re Gault*, 387 U.S. 1, 36 (1967).

Appellees assert (NARS Br. 33) that invalidation of the fee limitation, and the concomitant influx of lawyers, would not affect the informal and nonadversarial nature of the VA claims system. This assertion defies common sense and is inconsistent with the decisions of this Court, which recognize the undesirable effects that counsel can

have on such a process (see VA Br. 30-31). Appellees' very argument in favor of counsel—with its emphasis on increased hearings, cross-examination, expert witnesses, lengthy briefing, and the like (see NARS Br. 10, 13-14, 17, 28-31)—belies their blithe conclusion that the beneficial aspects of the claims system will remain unaltered.

Furthermore, these changes will redound to the detriment of veterans as a group. As the system now stands, the overwhelming majority of claimants are able to have their applications processed efficiently and satisfactorily without delay, without formality, and—most importantly—without the retention of an attorney whose fee will be paid from either the VA benefit award or the veterans' out-of-pocket funds.[1] Elimination of the fee limit would thus sacrifice the interest of the majority who are well-served by the existing process. Indeed, added participation by lawyers may induce veterans mistakenly to believe that retained counsel is necessary for the adequate presentation of a claim. See Verrill Dep. 199. Finally, as amicus curiae Disabled American Veterans demonstrates, the increased presence of attorneys could substantially impair the continued role of service organizations in the claims system. It is for Congress, not the courts, to accommodate these competing interests of all veterans, and Congress has consistently struck the balance in favor of the fee limit.

In support of their argument for a due process right to retain counsel, appellees rely primarily on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). That argument, however, disregards the subsequent decisions of this Court that have recognized in a number of settings that lawyers are not necessary to the fundamental fairness of an administrative process (see VA Br. 26). In any event, *Goldberg* v. *Kelly* is readily distinguishable. The welfare termination procedure at issue in that case was clearly more adver-

[1] Appellee American G.I. Forum contemplates (Br. 5 nn.1, 2) that a "complex" case would require 500 hours of attorney time at a rate of $100 per hour, or a total bill to the veteran of $50,000. See also J.A. 523.

sarial than the VA process, with none of the special protections and benefits that are provided in the VA system (397 U.S. at 257 n.3, 264 n.12, 269, 270-271). Moreover, in contrast to the VA process, many of the terminations of welfare payments turned on disputed issues of fact (*id.* at 268) as to which "credibility and veracity are at issue" (*id.* at 269); in that situation the skills of a lawyer were held to be essential to a fair hearing. Finally, *Goldberg* v. *Kelly* dealt with need-based welfare benefits that provided "the very means by which to live" (*id.* at 264); while service-connected benefits are unquestionably important to veterans and their dependents, such benefits are not based on standards of financial need and, like the social security disability benefits in *Mathews* v. *Eldridge* (424 U.S. at 340-343), do not give rise to the same private interest that was at stake in *Goldberg* v. *Kelly*. Accordingly, *Goldberg* v. *Kelly* does not establish a right to retained counsel in the VA claims system.[2]

5. For the reasons explained in our opening brief (at 24-32), the fee limitation in 38 U.S.C. 3404(c), viewed in the context of the informal and nonadversarial claims system that Congress intended, does not violate procedural due process. The fact that Congress elected not to

[2] *Boddie* v. *Connecticut*, 401 U.S. 371 (1971), also does not support appellees' position. In that case the Court struck down a filing fee for seeking a divorce in state court. The decision rested on the fundamental importance of marriage in our society, the absolute preclusion of access to the courts that occurred in some cases, and the fact that such exclusion resulted from the litigant's indigency. *Boddie* does not extend beyond its particular situation (see *United States* v. *Kras*, 409 U.S. 434 (1973); *Ortwein* v. *Schwab*, 410 U.S. 656 (1973)) and casts no doubt on the fee limit in the VA claims system.

Contrary to the suggestion in some of the opposing briefs, our argument does not depend on the "right-privilege" distinction. The fact that veterans' benefits are funded entirely by the public treasury (see VA Br. 3, 32) does not mean that no process is constitutionally due. On the other hand, the Due Process Clause, in weighing the relevant public and private interests, should accord Congress especially wide latitude to structure programs to administer benefits of this kind.

follow the traditional judicial model of an adversary proceeding, and instead created an alternative dispute resolution mechanism in which lawyers are not necessary to a fair procedure, does not state a due process violation. Thus, in the absence of an adequate basis to conclude that the VA claims system is fundamentally unfair without retained counsel, appellees' challenge to the constitutionality of Section 3404(c) must fail.[3]

Appellees recognize that such a threshold showing of unfairness attributable to the fee limit is indispensable to their argument. In an effort to meet their burden, they rely on the record that was compiled by the parties in discovery in this case. In the next section, we shall address appellees' specific assertions about the record. At this point, we raise more fundamental objections to appellees' basic approach.

Initially, we point out that appellees' position largely rests on the statements of individual claimants and attorneys who are dissatisfied with the VA claims system and, in particular, the fee provision. We do not doubt that in any large-scale benefit program some individual cases may be incorrectly decided. Nor do we doubt that some people may feel that the system is unfair. However, without impugning the good faith of those involved, we do doubt that such essentially impressionistic, anecdotal, and self-interested statements provide an adequate ground for a court to upset the considered enactments of Congress. Such an approach by its very nature offers an insufficiently comprehensive and reliable basis for a court to determine whether the overall system is fundamentally unfair as a result of the fee limit and thus to invalidate a statute enacted into law by the democratic branches of government.

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[3] Once the constitutionally required level of fairness has been met, the need for any further improvements is a matter for Congress. At that point, the question whether an additional increment in accuracy is justified, and at what cost, is an issue of legislative policy, not constitutional command. See, *e.g.*, *Landon* v. *Plasencia*, 459 U.S. 21, 35 (1982).

As explained in our opening brief (at 33-43), Congress has recently undertaken an extensive examination of the nature and operation of the existing VA claims system and has concluded that the system is nonadversarial and informal, that the VA and the service representatives provide effective assistance to claimants, that the system performs fairly and adequately without retained attorneys, and that an influx of retained lawyers would be undesirable and have adverse consequences for the benefits process. Appellees concede (NARS Br. 3, 21 n.12), as they must, that the district court's findings are both essential to its preliminary injunction against the validity of the fee limitation and irreconcilable with the determinations of Congress. The issue of the effect of the fee limit on the fairness of the claims system goes to the overall operation of the system, not the results in a relative handful of carefully selected cases. It is not a proper judicial function to conduct, in the guise of a due process inquiry, a legislative-type hearing into the overall fairness of a complicated nationwide benefit program. See also *Leary* v. *United States*, 395 U.S. 6, 35-36, 38 n.68 (1969).

Contrary to the suggestion in several of the opposing briefs, our argument does not require a court to abdicate its judicial responsibility. As our opening brief notes (at 36-37), it is and remains the ultimate duty of the federal judiciary to decide whether due process standards are satisfied.[4] But in fulfilling that duty, a court should apply the constitutional standard to the system as assessed by Congress. A court is free to conclude, where warranted as a matter of substantive law, that an administrative procedure is unconstitutional because the nature and operation of the overall system as determined by the legislature do not meet due process; at the same time, a court is not free to ignore those legislative

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[4] Even there, as the Court has recognized (see VA Br. 37 n.38), substantial weight should be accorded to the views of Congress and the responsible administrative agency. Appellees' response on this point (see NARS Br. 49 n.39), among other difficulties, simply ignores our citation to *Eldridge*, 424 U.S. at 349.

determinations and apply the constitutional standard to its own appraisal of the general process.[5]

Appellees object, however, that Congress's determinations upon which we rely are of no moment because the bills under consideration were not enacted into law. This objection is without merit. As described in our opening brief (at 38-43), the bills in question were passed by the Senate but not by the House. The Senate bills would have, among other things, modified the fee limitation, but only with respect to reconsideration before the Board of Veterans' Appeals and suits for judicial review as authorized in the proposed legislation; the fee modification was thus incident to the new provision for judicial review. At all stages of the VA administrative process through the initial BVA decision, the Senate bills retained the fee limit in Section 3404(c). It was in this setting that the legislative record established the informality and nonadversariness of the VA process and the adequacy of the representation provided by service organizations without charge. Since the bill that passed the Senate would have left the existing fee limit in place in the basic administrative system, the Senate's determinations concerning the nature and operation of that system—including, specifically, the fee limit—cannot, as appellees would have it, simply be shrugged off.[6]

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[5] Appellees' reliance (NARS Br. 46, 47) on *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 843-844 (1978), is misplaced. The question whether a particular newspaper publication presents a "clear and present danger" plainly involves a specific adjudicative determination rather than, as in the instant case, a general legislative one. Moreover, the "clear and present danger" issue is a mixed question of law and fact; just as a court would not have to accept Congress's ultimate conclusion that a given process is constitutionally fair, so too it would not have to accept a legislative conclusion that the legal "clear and present danger" standard is met.

[6] Appellees assert (NARS Br. 43 & n.32) that the Senate report itself recognizes the unfairness of the fee limit in the administrative process. This assertion is highly misleading. The material omitted in appellees' carefully edited quotation makes clear that the report was addressing the participation of retained attorneys at the BVA reconsideration stage and not in the rest of the VA

These determinations are not undermined by the fact that the bills were not adopted by the House. Rather, the House was unwilling to make even the limited modification in the fee provision that the Senate had passed. The House's refusal to concur in the Senate's proposed change surely does not discredit the determinations underlying the decision—with which both chambers agreed—to retain the existing fee limit for the basic administrative process. On the contrary, the legislative record can fairly be said to constitute a determination, from which no disagreement or dissent was anywhere expressed in Congress, that the VA claims system operates in an informal and nonadversarial manner, that service representatives provide effective assistance to claimants without charge, and that retained attorneys are not necessary to a fair procedure.

6. In the end, appellees are "asking [the Court] to establish as a constitutional rule something that [they were] unable to obtain statutorily from Congress." *United States* v. *New Mexico*, 455 U.S. 720, 744 (1982). It is plain that the wisdom and desirability of the fee limitation in 38 U.S.C. 3404(c) are matters of considerable controversy and dispute. But just as plainly, that debate is for Congress, not the courts, to resolve. Congress has recently considered, and continues to consider, the issue.[7] It is to that body that appellees should address their arguments.[8]

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claims system. See S. Rep. 97-466, 97th Cong., 2d Sess. 51 (1982) (appellees' omission supplied in italics):

> However, an individual should not be arbitrarily restricted in retaining an attorney, whether such representation is desired for reasons of personal preference or because of a concern that the claim is likely to be denied *a second time by the Board of Veterans' Appeals and will be appealed to court.*

[7] In addition to the currently pending bills cited in our opening brief (at 38 n.39, 44-45 & n.44), see also S. 367, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. S930-S937 (daily ed. Jan. 31, 1985); H.R. 924, 99th Cong., 1st Sess. (1985), and 131 Cong. Rec. H294 (daily ed. Feb. 4, 1985).

[8] For the reasons stated in our opening brief (at 46-49) the fee limit, if not a violation of due process, also does not violate appel-

II

In support of their position, appellees place essential reliance on the discovery record in this case. As discussed above, this record does not govern the legal issue presented here of the constitutional validity of 38 U.S.C. 3404(c). However, we cannot allow to go unanswered appellees' repeated misstatements of the record and aspersions upon the Veterans' Administration. Accordingly, we shall briefly respond to the most significant of appellees' assertions.

1. Appellees contend that claims involving Agent Orange, atomic radiation, and post-traumatic stress disorder (PTSD) are complex, that these complex claims are almost invariably denied, and that "[t]he fee limitation contributes to minuscule success rates in complex claims" (see NARS Br. 8-9). These contentions are without merit.

First, the record clearly shows that not all, or even most, of the Agent Orange, atomic radiation, and PTSD claims are complex; while such claims may be controversial in many ways, they are frequently routine and uncomplicated to decide. See Verrill Dep. 381; Standefer Dep. 50, 201, 264; Hawke Dep. 138, 140. Moreover, those cases, and especially the Agent Orange and atomic radiation cases, constitute only a very small proportion of the millions of claims that the VA handles each year. See Verrill Dep. 380, 381; Standefer Dep. 234; Woodall Dep. 34, 203; Jacobson Dep. 82.

It is also misleading to argue that complex claims are automatically and routinely denied. For example, many PTSD claims have been allowed. See Verrill Dep. 128, 430. Similarly, Agent Orange claims involving chloracne

lees' First Amendment rights to meaningful and effective access to the administrative process. See also *Ortwein* v. *Schwab*, 410 U.S. 656, 660 n.5 (1973) ("[o]ur discussion of the Due Process Clause * * * demonstrates that [the parties'] rights under the First Amendment have been fully satisfied"). Appellees acknowledge (NARS Br. 22) that their First Amendment argument rests on the same facts as their due process argument.

have also been granted on a regular basis. See Verrill Dep. 482, 491, 496; Jacobson Dep. 59.

On the other hand, where these assertedly complex claims have been denied, the decisions have been based either on existing and accepted medical principles, which fail to establish a causal connection between the event in service and the disease in question, or on the absence of facts in the particular case to provide reasonable support for the claim.[9] With respect to Agent Orange, there is no demonstrated relation between exposure and subsequent diseases other than chloracne, and the VA has simply followed this medical conclusion in denying Agent Orange claims. See Verrill Dep. 196; Standefer Dep. 240; Woodall Dep. 69-70, 72, 256; Jacobson Dep. 47-48; see also VA Br. 32-34 n.34.[10] Likewise, medical research has not shown a relation between low levels of radiation and the diseases for which benefit claims are being denied. See Standefer Dep. 73, 195-197; Woodall Dep. 35-36, 143, 256, 276; Hawke Dep. 40. See also H.R. Rep. 98-592, 98th Cong., 2d Sess. 7, 9 (1984). And many Agent Orange and atomic radiation cases are denied because the service and medical records prove that the veteran's claim of exposure is simply incorrect, because the disease is clearly the result of some other cause such as heredity or chronic cigarette smoking, or because the veteran had no disability at all. See Verrill Dep. 176, 192-193; Jacobson Dep. 154-155; H.R. Rep. 98-592, *supra*, at 6.[11] PTSD

[9] Medical research, much of which is conducted or funded by the government, is continuing in these areas. See, *e.g.*, H.R. Rep. 98-592, 98th Cong., 2d Sess. 4-5, 7 (1984); R. 151, Exh. 186, at 2.

[10] See also *In re "Agent Orange" Product Liability Litigation*, MDL No. 381 (E.D.N.Y. Feb. 8, 1985), slip op. 20, 23; H.R. Rep. 98-592, *supra*, at 4, 5, 7-10, 13; Washington Post, Feb. 12, 1985, at A12, col. 2.

[11] In the case of plaintiff Maxwell, for instance, the VA found that the location of his enemy prison camp was more than 300 miles from Hiroshima, not 80 miles as he alleged. See Verrill Dep. 470; Hawke Dep. 86. In the case of plaintiff Wilson, the VA was able to determine from service records that her husband, in his job as a technician, would not have been exposed to the levels of radiation that were claimed. See Verrill Dep. 261-262.

claims have also been denied because the service records disprove the alleged traumatic event or the disability was clearly caused by either a pre-existing personality disorder or an intervening factor such as drug or alcohol abuse. See Verrill Dep. 417, 419, 427.[12]

In sum, it is the lack of merit of these claims, not the absence of lawyers, that leads to their rejection. See Verrill Dep. 95, 233; Standefer Dep. 195-196. Indeed, even though plaintiff Swords to Plowshares (see J.A. 171; VA Br. 48 n.54) and amicus curiae Vietnam Veterans of America (see VVA Br. 2) use attorneys as service representatives, appellees have adduced no evidence that they have higher success rates than other organizations in so-called complex cases involving Agent Orange, atomic radiation, and PTSD.

2. Appellees also assert that the VA claims system is complicated, that it is adversarial, and that VA personnel do not assist claimants in seeking benefits.

We do not dispute that the VA system is complicated, in the sense that it is governed by an extensive array of substantive and procedural provisions that might well confuse an inexperienced claimant if he attempted to pursue an application for benefits without the help of the VA and a service representative. But that proposition is simply irrelevant to this case. First, no single claim involves the full range of provisions that the VA has promulgated to deal with the host of issues that may arise in the entire claims system. Moreover, the relevant provisions are explained to the claimant in lay terms that are easily understood and intelligible (see page 13, *infra*). Finally, the veteran need not stand alone in developing and presenting his claim; instead, it is the responsibility of the VA and the service representative to aid him in establishing his claim.[13]

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[12] In some instances, for example, the VA found that veterans alleging a traumatic combat experience in Vietnam had never been stationed in Vietnam. See Phillips Dep. 87.

[13] Appellees often present a misleading picture of the claims system by discussing *unrepresented* veterans and the problems that they might face if they were proceeding entirely on their own. See NARS Br. 5, 7, 16, 18. This ignores the important role of the VA and the service organizations in the nonadversarial process and thus distorts the administrative context in which the fee limitation must be viewed.

The record lends no support to appellees' characterization that the VA system is adversarial. On the contrary, the evidence of VA officials consistently establishes that they administer the system in a nonadversarial and unbiased manner and furnish substantial assistance to the claimant in an effort to grant benefits. See Verrill Dep. 199; Standefer Dep. 37, 43, 50, 136, 171, 225-226, 257-258, 269; Woodall Dep. 35, 37, 84, 87; Jacobson Dep. 20-22, 88, 93-94, 129, 143, 148, 154, 161, 166, 180-181, 184; Phillips Dep. 17, 41, 53; Hawke Dep. 4, 141-142, 146.[14]

Nor do any of appellees' specific complaints demonstrate that the system is an adversarial one in which the VA opposes rather than aids the claimant. Appellees note that time limits exist for the submission of certain forms or information and that failure to comply can result in denial of a claim. However, they ignore the fact that there are very few such time limits, that the periods provided are usually quite generous (for example, a one-year period for filing a simple document, called a notice of disagreement, that is similar to a notice of appeal and serves to initiate the VA appeals process), and that the requirements are clearly explained to claimants and easily satisfied. See Verrill Dep. 307, 513; Woodall Dep. 144-146; Jacobson Dep. 143, 148. The provisions for timely and efficient processing of a claim are hardly oppressive and plainly do not necessitate the adversarial skills and guid-

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[14] One of appellees' witnesses stated that "[t]he VA claims process is truly an adversarial process" because "[t]he VA has the money and the veteran wants it. What's more adversarial than that?" See R. 66, Stavick Decl. ¶ 9. Such a simplistic and indeed cynical view does not indicate that the system is adversarial. Compare *Eldridge*, 424 U.S. at 339; *Richardson* v. *Perales*, 402 U.S. 389, 403 (1971). See also Verrill Dep. 41-42 (interest of the VA is to award benefits wherever possible under the law); compare NARS Br. 17 n.8.

ing hand of a lawyer. Cf. *United States* v. *Boyle*, No. 83-1266 (Jan. 9, 1985).

In addition, appellees object that a claimant has the burden of proof to establish his entitlement. The applicable standard is that the claimant must "submit evidence sufficient to justify a belief in a fair and impartial mind that his claim is well grounded." 38 C.F.R. 3.102. This requirement is met where there is "some evidence" indicating "a reasonable possibility of a valid claim." Jacobson Dep. 23-24. Such an exceedingly liberal standard, especially in view of the reasonable doubt doctrine in favor of the claimant (38 C.F.R. 3.102) and the assistance provided by the VA and the service representative, does not show that the system is unfair or adversarial.

Indeed, despite appellees' seeming complaints about it, the reasonable doubt standard well illustrates the supportive and nonadversarial nature of the process. This standard requires that benefits be granted if there is a reasonable and non-speculative basis for finding a valid claim. See Verrill Dep. 32; Standefer Dep. 197; Woodall Dep. 113, 143; Phillips Dep. 86; Hawke Dep. 127, 136-137. In applying this standard to the types of "complex" cases that appellees emphasize, the VA will concede a claimed exposure to Agent Orange if the veteran was in Vietnam and the exposure is not affirmatively disproved by service records (see Verrill Dep. 494-495; Woodall Dep. 71; Phillips Dep. 75; H.R. Rep. 98-592, *supra*, at 17); in atomic radiation cases, the VA will concede both the claimed presence at the site and the claimed level of exposure unless it can prove to the contrary (see Verrill Dep. 66, 97, 203, 261-262, 316, 470, 537; Standefer Dep. 232); and, with respect to PTSD, the VA will accept the alleged in-service trauma, even in the absence of corroborating documentation, unless the veteran's records refute the claim or there was a pre-service trauma that is the cause of the asserted disability (see Verrill Dep. 419, 424-429, 431; Woodall Dep. 149-150, 152; Jacobson Dep. 102).

Appellees further argue that the system is unfair and adversarial because the claimant is instructed that his

"substantive appeal should set out specific argments as to error of fact or law" and that he "will be presumed to be in agreement with any statement of fact contained in the statement of the case to which no exception is taken." 38 C.F.R. 19.121(b)(2) and (3); see also 38 C.F.R. 19.123(a), 19.180(a). However, the regulations also provide that the Board of Veterans' Appeals "will construe [the claimant's] arguments in a liberal manner for purposes of determining whether they raise issues on appeal" (38 C.F.R. 19.123(a)) and that, notwithstanding the above instructions, "[d]ecisions of the Board * * * shall be based on a review of the entire record" (38 C.F.R. 19.180(a)). In fact, the provisions on substantive appeals are applied in a very informal and non-technical fashion. See Verrill Dep. 467; Standefer Dep. 153-156, 163; Jacobson Dep. 187.

Appellees also assert that an insignificant number of BVA appeals are taken and that hearings are seldom held, and they accuse VA officials of "concerted efforts * * * to induce [claimants] to surrender important procedural rights" (NARS Br. 16). These contentions are unfounded.

First, in the VA recordkeeping system, the total number of decisions includes those, such as full benefit allowances, that as a practical matter would not be appealed. Moreover, several decisions can be made in the course of a single case, and each of these is separately counted in the VA's total even though they would be subject to only one appeal. See Verrill Dep. 160-167; Woodall Dep. 61-63; Jacobson Dep. 127. In addition, many claims are clearly insubstantial and seek benefits for which the veteran realizes he is probably ineligible. See Phillips Dep. 48, 87; Woodall Dep. 58, 60. Thus, by exaggerating the number of realistically appealable decisions, appellees significantly understate the true rate of appeals.

Furthermore, many claimants drop their appeals when, between the notice of disagreement and the substantive appeal, they receive the statement of the case from the VA Regional Office. This is exactly the way that Congress intended the process to operate; indeed, one of the prin-

cipal purposes of the statement of the case is to provide a full explanation of the initial decision in order to eliminate appeals that clearly would be meritless and would arise only because the claimant did not know or correctly understand the basis for the denial. See S. Rep. 1843, 87th Cong., 2d Sess. 2, 3-4 (1962); H.R. Rep. 1454, 87th Cong., 2d Sess. 5, 8 (1962). Accordingly, the fact that appeals are not pursued in light of the statement of the case does not demonstrate any unfairness or governmental overreaching. See Verrill Dep. 357; Standefer Dep. 108-109; Woodall Dep. 60, 237; Jacobson Dep. 144.[15]

Appellants also misperceive the nature of the hearing process on appeal. Hearings can be held before the BVA in Washington or, for the convenience of the claimant, before traveling panels of the BVA that conduct proceedings around the country. In addition, again for the convenience of the claimant and to enable him to avoid possible delays in waiting for a traveling panel, a veteran can elect to receive a hearing before the Regional Office and have the transcript submitted to the BVA for consideration in connection with the appeal. In total, hearings are held in approximately 35% of service-connected appeals. See J.A. 525, 527. And in the remaining cases, as the record reflects, hearings are frequently not requested because the veteran believes he has nothing more to present and it is not worth the time, expense, and effort to appear at a hearing. See Verrill Dep. 75, 356; Standefer Dep. 70, 123, 126; Woodall Dep. 58-59; Phillips Dep. 51; Jacobson Dep. 29, 183, 202.

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[15] Appeals can also end for a number of other—and wholly innocent—reasons. For example, if the claimant dies, the appeal lapses. In addition, if the veteran brings up a new basis for benefits after the notice of disagreement is filed, it would be treated as an amended claim that would be considered by the Regional Office, and hence the existing appeal would be terminated without prejudice. See Woodall Dep. 238, 242. Or a claimant could simply choose to drop an appeal for a variety of personal reasons; plaintiff Maxwell, for example, elected not to appeal a denial because he was employed at the time and felt that benefits could better go to someone else (J.A. 308, 329).

Finally, appellees greatly mischaracterize the record in charging that the VA has engaged in a deliberate attempt to induce claimants to forgo hearings and other procedural rights. See Standefer Dep. 126. They rely entirely on two specific instances. First, they point to an informal, handwritten memo in one of the regional offices that stated that hearings should generally be held only after the statement of the case had been issued. The memo was designed to reduce a backlog in requested hearings, and minimize the burden for both the claimant and the agency, by postponing hearings where (1) an initial decision was likely to be a grant of benefits, so that no hearing would be necessary, and (2) a hearing was requested after an initial adverse decision but before the statement of the case, so that the claimant was not yet fully aware of the basis for the denial and would be entitled to a second, duplicative hearing after the statement of the case had been furnished to him. See Verrill Dep. 273-299, 409; Jacobson Dep. 29-33; Hawke Dep. 146-147. For present purposes, it is sufficient to note that this memo did not represent national VA policy and was not even controlling in the one Regional Office, that VA officials stated that the memo was erroneous and would have been corrected if they had known of it, and that in any event the memo was in effect only for a limited time and was superseded in 1982 by changes in the VA manual on hearing procedures. See Verrill Dep. 274, 282-283, 289, 295, 297, 299, 409; Woodall Dep. 15, 24-29, 136. Even conceding that the memo was mistaken, however, it hardly provides a basis for either condemning the good faith of the VA or striking down the fee limitation statute.

The other instance cited by appellees concerns two letters from a Regional Office to claimants that discuss the hearing process. Appellees contend that the letters were designed to discourage claimants from exercising their right to a hearing. Once again, VA officials acknowledged in discovery that these letters—which were dictated for particular cases and were not "pattern" or form letters used throughout the VA (see Verrill Dep. 80-84)—were

ill-advised and inappropriately drafted in certain respects. See Verrill Dep. 81; Standefer Dep. 127-132; Woodall Dep. 55-57, 290-295. Even if these letters were incorrect, however, they afford no ground to impugn the integrity and fairness of the VA or to invalidate the fee limit.[16]

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[16] Appellees raise a miscellany of other criticisms (NARS Br. 6-7, 17-18) that can be addressed only briefly here. Contrary to appellees' assertion, all of the VA witnesses correctly understood the rule of presumptive eligibility and stated that any errors in its application were rare. See Verrill Dep. 46, 447-498, 501, 563-564; Woodall Dep. 37-38, 45, 191; Phillips Dep. 73; Jacobson Dep. 172. Regional offices do not request independent private medical examinations because they routinely obtain VA exams and are encouraged to refer close cases involving a reasonable doubt to the VA Central Office (which can, where appropriate, seek an independent exam). See Verrill Dep. 16, 51-52, 127, 231; Woodall Dep. 39, 43-44, 117; Jacobson Dep. 56, 59, 80, 151. The VA seldom uses its subpoena power because it has no trouble in obtaining necessary records and therefore does not have to resort to formal process. See Verrill Dep. 62; Standefer Dep. 248; Phillips Dep. 67; Jacobson Dep. 135. The VA relies on the Defense Nuclear Agency of the Department of Defense as the office responsible for and expert in obtaining radiation information from all areas of the government and determining radiation dosages in veterans' claims involving atomic radiation. See Verrill Dep. 21, 53, 99, 316; Standefer Dep. 229, 238, 326; Woodall Dep. 47, 78, 210, 212; Jacobson Dep. 73, 84, 157; R. 151, Exh. 186, at 1, 3. The VA allows so-called "buddy" statements from fellow servicemen to corroborate a claim but generally leaves it to the veteran or the service representative to obtain the statement, and in fact buddy statements are frequently submitted (see Verrill Dep. 313, 317, 550; Standefer Dep. 226, 251, 269; Woodall Dep. 78, 155-157; Phillips Dep. 42; Jacobson Dep. 104, 107); moreover, all Agent Orange and atomic radiation claims are forwarded to the VA Central Office, which maintains an index of such cases and a registry for identifying and locating claimants (see Verrill Dep. 33, 205, 212, 214, 492, 499-500; Standefer Dep. 27-28, 77-78; Woodall Dep. 159, 275; Jacobson Dep. 56, 128; Hawke Dep. 126; see also VA Br. 28 n.26). The figure of 2.84 hours per claim is part of a management productivity review system that, in evaluating performance, considers quality as well as efficiency; more time is often spent on particular claims, and the number 2.84 hours is merely the expected *average* processing time for claims over a six-month period. See Verrill Dep. 167-175; Woodall Dep. 48-53, 245; Phillips Dep. 43; Jacobson Dep. 130-132; Hawke Dep. 63, 139, 143.

3. Appellees contend that service representatives do not provide adequate assistance to claimants.[17] While there is, of course, some variety among the thousands of service officers, every VA official testified below that such representation is effective and meaningful. See Verrill Dep. 198, 245-246; Standefer Dep. 48, 176-181, 195, 199, 201, 231, 236, 305-307; Woodall Dep. 80, 102, 256-259, 268; Phillips Dep. 17, 35, 47, 60-61; Jacobson Dep. 179-183; Hawke Dep. 37-38. These depositions, as well as the affidavits submitted by several national service organizations, explain the training that the representatives receive, the intimate knowledge and familiarity they develop through their day-to-day involvement in the claims system, and the ready access they have to VA personnel and materials. See Verrill Dep. 207, 210, 237-238; Standefer Dep. 176-181, 201, 236-238, 306-307; Woodall Dep. 80, 102; J.A. 160-169, 173-177; R. 176, Fong Att. And on the infrequent occasions when a service representative has not adequately developed or presented a claim, the record shows that VA personnel have acted to protect the interest of the veteran. See Verrill Dep. 199; Phillips Dep. 17; Jacobson Dep. 180-181, 184.[18]

Strong corroboration of the adequacy of this representation is the fact that claimants represented by serv-

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[17] Appellees appear to confuse (NARS Br. 9) local members of service organizations, who may be part-time and unpaid volunteers, with accredited national service officers, who can represent veterans in VA claims and are full-time and paid employees of the service organizations. See Verrill Dep. 248, 505; Standefer Dep. 185; Woodall Dep. 92-93; J.A. 160-161, 173-175.

[18] In the case of plaintiff Maxwell, for example, a service representative interviewed him for more than two hours at their first meeting, arranged for a medical examination, had several telephone conversations with Maxwell, scheduled a VA hearing, met with Maxwell for 45 minutes before the hearing, and conducted Maxwell's presentation before the VA (J.A. 315-317). Moreover, another service representative located records that Maxwell had been unable to obtain (J.A. 326). While we do not contend that this example is necessarily typical, it is at least as illuminating as the unusual and extreme instances that appellees cite to show the inadequacy of service representatives.

ice organizations have virtually the same rate of success—and in some instances a higher rate—than claimants represented by an attorney. See J.A. 163-164, 190-191, 535-541, 574-582; see also VA Br. 42-43. Appellees contend (NARS Br. 14 n.7) that these statistics are not meaningful because attorneys currently appearing before the VA are handicapped by their general unfamiliarity with the claims system and the limited time and resources they can devote to a case in light of the fee limit. But appellees overlook the fact that service organizations, unlike attorneys, represent any claimant who requests their assistance regardless of the prospects of prevailing on the claim. See J.A. 163-164, 176. On balance, the available statistics—which are the only objective measure of performance that has been presented in this case—are sufficient at a minimum to confirm that service organizations provide effective representation.

Finally, appellees' specific criticisms of service organization representation are unfounded. The written submissions of service officers, which generally consist of a two-page typed statement presenting the claimant's position and supporting facts, are recognized by the VA to be fully adequate (see Standefer Dep. 9, 168-169, 182, 184, 305-306; Woodall Dep. 80-81; Phillips Dep. 20, 49, 61, 91); given the BVA process and the primarily medical rather than legal nature of the issues that arise (see Standefer Dep. 290; Woodall Dep. 75; Phillips Dep. 23-24; Jacobson Dep. 25, 171), the fact that service representatives do not file lengthy briefs with extensive citation to authorities, as appellees would prefer, does not indicate any shortcoming on their part. Nor is it the case that the submission to the BVA is frequently written by the claimant himself rather than the service representative; while claimants may fill out a simple VA form to complete the docketing of the appeal, the substantive presentation to the BVA is prepared by the service representative. See Standefer Dep. 9, 168-169, 182-184; Woodall Dep. 80-81; Phillips Dep. 20, 49, 91.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted.

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